1879

Appeal

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Filed

April 29th

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 288.

PHILADELPHIA BAR ASSOCIATION

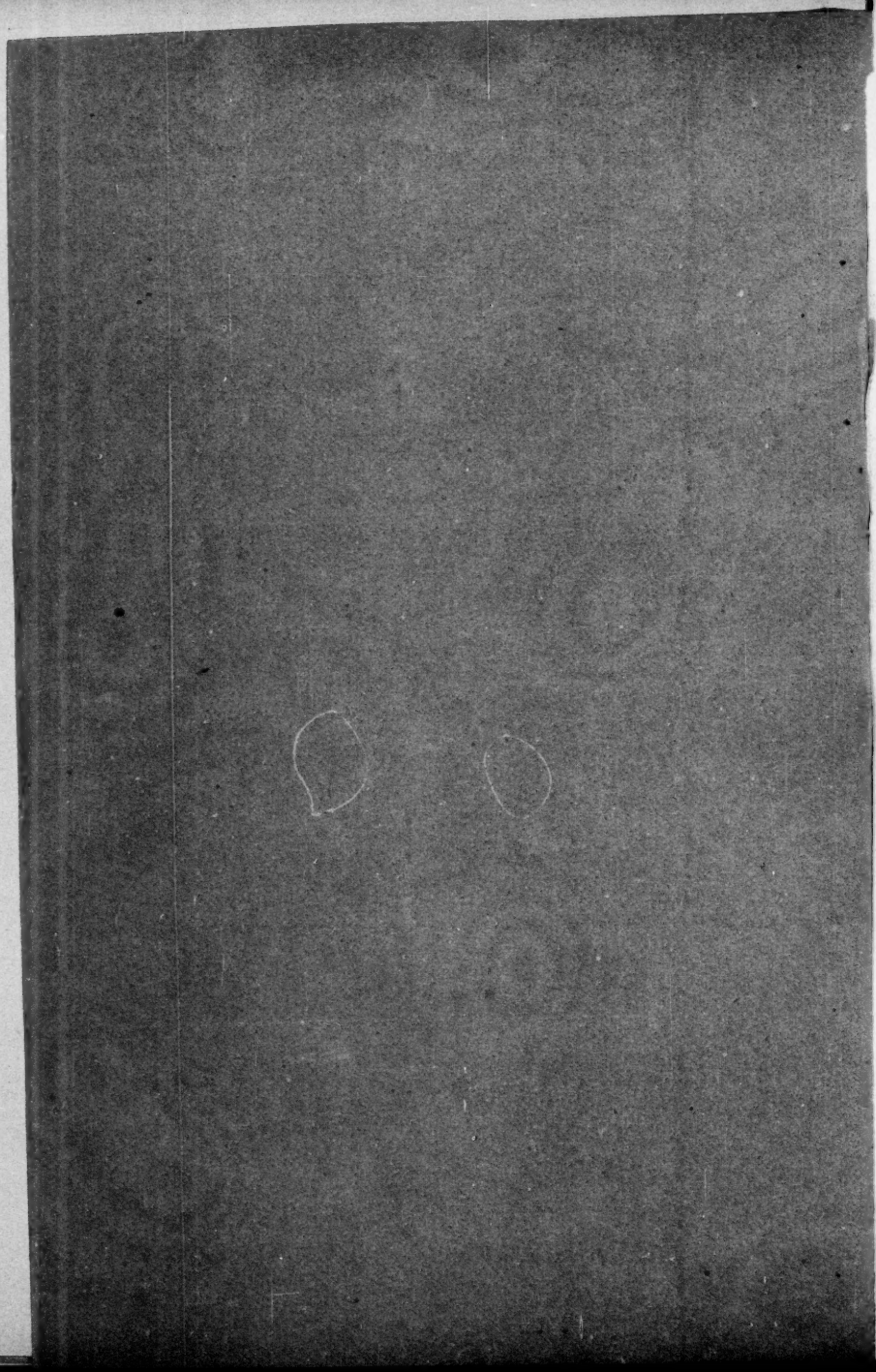
CHARLES HOWARD, PLAINTIFF IN ERROR,

vs.

THE MILWAUKEE AND SAINT PAUL RAILWAY COMPANY ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 13, 1877.



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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the first Monday (being the second day) of October, A. D. 1876.

Present, the honorable Charles E. Dyer, district judge, presiding; Charles S. Hamilton, marshal; and Edward Kurtz, clerk. Among other the following proceedings were had, to wit:

CHARLES HOWARD, PLAINTIFF,
vs.
THE MILWAUKEE & ST. PAUL RAILWAY COMpany, Joachim D. Schram, George Martin, George P. Scheiderer, Edward Sanderson, Byron H. Kilbourn, Edward Esche, A. J. Quinn, Leander Comstock; Byron H. Kilbourn & I A. Lapham, as executors of the last will & testament of Byron Kilbourn, dec'd; Charles Winterfield, Rudolph Wiese, William Bruse, Joseph Phillips, George Shinn, & John T. Kopmeier, defendants. } At law.

Be it remembered that heretofore, to wit, on the 25th day of August, A. D. 1873, came the above-named plaintiff by his attorneys,
2 Messrs. Carpenter & Murphey, and filed his præcipe for a summons against the above-named defendants as follows, to wit:

Præcipe for summons.

Circuit court of the United States for the eastern district of Wisconsin.

CHARLES HOWARD, PLAINTIFF,
vs.
THE MILWAUKEE AND ST. PAUL RAILWAY Company, Joachim D. Schram, George Martin, George P. Scheiderer, Edward Sanderson, Byron H. Kilbourn, Edward Esche, A. J. Quinn, Leander Comstock; Byron H. Kilbourn and I. A. Lapham, as executors of the last will and testament of Byron Kilbourn, deceased; Charles Winterfield, Rudolph Wiese, William Bruse, Joseph Phillips, George Shinn, John T. Kopmeier, defendants.

SIR: Please issue a summons for relief in above-entitled action returnable according to law.

Aug. 23, 1873.

Yours,

CARPENTER & MURPHEY,
Plaintiff's Attorney.

To E. KURTZ, Esq., *Clk.*

And on the same day filed bond for costs which is approved.

Whereupon a summons issued, as follows:

3 The circuit court of the United States for the eastern district of Wisconsin.

CHARLES HOWARD, PLAINTIFF,
vs.
THE MILWAUKEE & ST. PAUL RAILWAY COMpany, Joachim D. Schram, George Martin, Goeorge P. Scheiderer, Edward Sanderson, Byron H. Kilbourn, Edward Esche, A. J. Quinn, Leander Comstock; Byron H. Kilbourn & I. A. Lapham, as executors of the last will & testament of Byron Kilbourn, deceased; Charles Winterfield, Rodolph Wiese, William Bruse, Joseph Phillips, George Shinn, & John T. Kopmeier, defendants.

Summons for relief.—Complaint not served.

The President of the United States of America to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in this action, which will filed in the office of the clerk of this court, at Milwaukee, in said district. And you are also required to file your answer thereto in said clerk's office at Milwaukee, and to serve a copy thereof on the attorneys of the plaintiffs, whose names are subscribed hereto, at their office in Milwaukee, Wis., within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will apply to the court for the relief demanded in the complaint. The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Nathan Clifford, first associate justice of the Supreme Court of the United States, at the city of Milkaukee, in the said eastern district of Wisconsin, this 25th day of August, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the 98th.

[L. S.] EDWARD KURTZ, *Clerk.*

CARPENTER & MURPHEY, *Attorneys.*

4 *Return.*

Summons return:

I hereby depute W. C. Brown to serve and return this summons.

C. S. HAMILTON,
U. S. Marshal.

Served on the within-named The Milwaukee & St. Paul Railway Company by delivering to S. S. Merrill, its general manager, & R. D. Jennings, its secretary & treasurer, each of them personally, this 1st day of September, 1873, a copy of this summons, and served on the within-named Joachim D. Schram, George Martin, Edward Sanderson, Edward Esche, I. A. Lapham as executor, &c., Charles Winterfield, Rudolph Wiese, & John T. Kopmeier, by delivering to each of them personally

a copy of this summons this 1st day of September, 1873, and served on the within-named George P. Scheiderer, Leander Comstock, William Bruse, Joseph Phillipps, & George Shinn, by leaving a copy of this summons at their usual places of abode in presence of members of their families of suitable age and discretion, whom I informed of the contents thereof, they not being found this 1st day of September, 1873, and served on the within-named A. J. Quinn by delivering a copy of this summons to D. G. Power, his attorney, whose acceptance of service is hereto annexed, this 3rd day of September, 1873, and served on the within-named Byron H. Kilbourn, and Byron H. Kilbourn as executor, &c., by leaving two copies of this summons at his usual place of abode in presence of a member of his family of suitable age and discretion, whom I informed of the contents thereof, he not being found, this 3d day of September, 1873.

C. E. HAMILTON,
Marshal,
W. C. BROWN,
S. Deputy.

Fees, $48.40.

The above return subscribed & sworn to before me this 20th day of September, A. D. 1873.

EDW. KURTZ, *Clerk.*

5 Service of this summons upon J. A. Quinn is hereby accepted.

A. J. QUINN,
By D. G. POWER,
His Attorney.

MILWAUKEE, Sept. 3, '73.

SEPTEMBER 30, 1873.

This day came the plaintiff, by his attorneys, & filed his complaint as follows:

Complaint.

Circuit court of the United States for the eastern district of Wisconsin.

CHARLES HOWARD, PLAINTIFF,
vs.
THE MILWAUKEE & ST. PAUL RAILWAY COMPANY, J. D. Schram, Geo. Martin, G. Scheiderer, Edward Sanderson, Byron H. Kilbourn, Edward Esche, J. A. Quinn, L. Comstock, Byron H. Kilbourn, & I. A. Lapham, as executors of the last will and testament of Byron Kilbourn, deceased; Charles Winterfield R. Weise, W. Bruse, Joseph Philips, George Shinn, and John T. Kopmeier, defendants.

The plaintiff, for an amended complaint, complains and alleges:

1. That he is a citizen of the State of New York, and resides at the city of New York, in said State.

2. That since May 5th, 1863, & at all times since that date, the defendant The Milwaukee & St. Paul Railway Company has existed & now exists, as a corporation under and by virtue of the laws of
6 the State of Wisconsin, and it, with all the other defendants above named, are citizens of the State of Wisconsin.

3. That the plaintiff is the owner in fee-simple and is entitled to the possession of all of the following described real property, the same situate, lying, and being in the city of Milwaukee, in the county of Milwaukee, in the State of Wisconsin, to wit: Lots one (1), three (3), and four (4), in block one (1); lots one, four, seven, and eight, in block thirteen; lots nine, eleven, and twelve, in block fifteen; lots four, eleven, and twelve, in block sixteen; lot six in block nineteen; lots five and thirteen in block twenty; lot seven in block twenty-one; lots eight and sixteen in block twenty-two; lots one, three, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, in block thirty; all in the sixth ward of said city of Milwaukee.

Also lots one and two and all of lot three, except the south sixty feet, in block thirty-three; lots two, three, four, seven, eight, nine, and the south half of lot six; all that part of the north half of lot five which lies east of a line beginning at a point on the north line of said lot twenty-six feet and six inches east of the east line of Third street or west line of said lot, running thence somewhat east of the south to a point distant thirty-four feet six inches from said street, in block forty. Also

7 all that part of lot one which lies next of a straight line drawn from a point in the south line of said lot sixteen feet east from the west side of said lot to a point in the north line of said lot eight and one-half feet from the west line of said lot in block forty; also lot ten, excepting and reserving from the grant that part which Jabez K. Botsford once conveyed to F. C. Lockner, being a strip from off the north side of said lot twenty feet wide and running east seventy-five feet in block forty; lots one, two, three, four, five, six, seven, eight, nine, and ten, in block forty-one, all in the second ward of said city of Milwaukee.

Also lots seven and eight and part of lots five and six in block thirty-three in Sherman's addition; that part of lot four which lies east of the La Crosse & Milwaukee Railroad in block forty-seven; lot one in block forty-eight; that part of the reserved acre in Sherman's addition which lies east of the right of way of said La Crosse & Milwaukee Railroad, all in Sherman's addition in the sixth ward of said city of Milwaukee; lots five, six, seven, eighteen, nineteen, forty, forty-one, forty-two, forty-three, forty-eight, fifty, fifty-one, fifty-nine, sixty, sixty-nine, seventy-one, seventy-two, seventy-three, seventy-four, eighty-four, eighty-eight, being canal lots (so called).

Also the interest formerly owned by Byron Kilbourn, deceased,

8 in a part of the island extending below Point street in lot one, section twenty, township seven, range seventy-two.

Also five and forty-three one-thousandths of an acre in lot eighty-three of the subdivision of lots two and three, section twenty-first, township seven, range twenty-two, all in the sixth ward of said city.

Also lots four and five in block fifty in the seventh ward of said city of Milwaukee.

4. That the defendants above named unlawfully withhold possession thereof from the plaintiff.

Wherefore the plaintiff demands judgment:

1. For the possession of the said premises, and of each lot part and parcel thereof.

2. For fifty thousand dollars damages for withholding the same.

CARPENTER & MURPHEY,
Plaintiff's Attorneys.

SEPTEMBER 23, 1873.

This day came the defendants, The Milwaukee & St. Paul Railway Company, Joachim D. Schram, George Martin, George P. Scheiderer, and William Bruse, by their attorney, Mr. John W. Cary, and filed their answer as follows:

Answer of Mil. & St. P. R'y.

Circuit court of the United State for the eastern district of Wisconsin.

CHARLES HOWARD
vs.
9 THE MILWAUKEE AND ST. PAUL RAILway Company, Joachim D. Schramm, Gearge Martin, George P. Scheiderer, and William Bruce, impleaded with others.

And the said defendants, The Milwaukee and St. Paul Railway Company, Joachim D. Schramm, George Martin, George P. Scheiderer, and William Bruce, by John W. Cary, their attorney, answering the said complaint, deny each and every allegation of said complaint and each and every matter and thing therein contained.

JOHN W. CARY,
Attorney for said D'f'd'ts.

DECEMBER 15, 1873.

This day came the defendant John T. Kopmeier, by his attorneys, Messrs. Rogers & Hover, and filed his answer.

APRIL 18, 1874.

This dav came the defendant Edward Sanderson, by his attorneys, Messrs. Wells & Brigham, and filed his answer.

SEPTEMBER 29, 1874.

This day came the defendants Leander Comstock and George Shinn, by their attorney, Mr. Pereles, and filed their separate answers.

And now, at this same term, to wit, October term, A. D. 1876
10 and on the twenty-first day thereof, to wit, on the ninth day of November, A. D. 1876, the following proceedings were had, t wit:

CHARLES HOWARD
vs.
THE MILWAUKEE & ST. PAUL RAILWAY COMpany et als. } At law.

This day came the plaintiff by his counsel, and on his motion it is ordered by the court that this cause be and hereby is discontinued as to the defendant Joseph Phillips.

Trial.

DECEMBER 6, 1876.

This day came the plaintiff, by his counsel, Mr. H. M. Finch, and the defendant The Milwaukee & St. Paul Railway Company by its counsel, Mr. Cary, and the issue herein between the plaintiff said the defendant came on to be tried.

Whereupon a jury was called to try the same, who came, to wit, M. W. Simmons, J. D. Fowler, Peter Myers, A. T. Germond, Homer Glass, John Ewing, B. H. Bettis, C. L. Douglas, D. N. Collar, Levi M. Tompkins, Solomon T. Bolles, and Peter V. Sang, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded the same was adjourned until to-morrow morning.

DECEMBER 7, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee & St. Paul Railway Company was resumed, and not being concluded
11 the same was adjourned until to-morrow morning.

DECEMBER 8, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee & St. Paul Railway Company was resumed, and not being concluded the same was adjourned until to-morrow morning.

DECEMBER 9, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee & St. Paul Railway Company was resumed, and not being concluded the same was adjourned until Monday morning next.

DECEMBER 11, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee & St. Paul Railway Company was resumed, and not being concluded the same was adjourned until to-morrow morning.

DECEMBER 12, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee & St. Paul Railway Company was resumed, and not being concluded the same was adjourned until to-morrow morning.

DECEMBER 13, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee
12 & St. Paul Railway Company was resumed, and not being concluded the same was adjourned until to-morrow morning.

DECEMBER 14, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee & St. Paul Railway Company was resumed, and not being concluded the same was adjourned until Saturday morning next.

DECEMBER 16, 1876.

This day came the parties by their counsel, and the trial of the issue herein between the plaintiff and the defendant The Milwaukee & St. Paul Railway Company was resumed, and not being concluded the same was adjourned until Thursday the twenty-eighth instant.

Verdict & Judgment.

DECEMBER 28, 1876.

This day came the plaintiff and the defendant The Milwaukee & St. Paul Railway Company by their respective counsel, and the trial of the issue herein between them was resumed. And the jurors of the jury aforesaid being charged by the court on their said oaths respectively, do say that they find the issue in favor of the said defendant The Milwaukee & St. Paul Railway Company.

And came the plaintiff by his counsel and moved the court for a new trial for reasons filed.

And said motion being submitted by the counsel of the parties, on consideration thereof it is ordered by the court that the same be, and hereby is, overruled.

13 Whereupon it is considered and adjudged by this court now here that the said plaintiff take nothing by his writ against the said defendant The Milwaukee & St. Paul Railway Company, and that the said defendant do have and recover of the said plaintiff, Charles Howard, forty-nine dollars and forty-six cents, its costs about its said defense in this behalf by it expended, and that it have execution therefor.

Judgment-roll signed December 28th, A. D. 1876.

EDWARD KURTZ,
Clerk.

Costs, $49.46.

FEBRUARY 28, 1877.

Upon the stipulation of the parties in writing herein filed, it is ordered by the court that the time for settling the bill of exceptions in this cause be extended twenty days from this date.

MARCH 20, 1877.

Bill of exceptions signed and filed, as follows:

14 Circuit court of the United States, eastern district of Wisconsin.

CHARLES HOWARD
vs.
THE MILWAUKEE & ST. PAUL RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the 6th day of December, 1876, the issue made by the answer of The Milwaukee & St. Paul Railroad Co. in the above entitled cause came on to be heard in the court-room of the U. S. circuit court in and for the eastern district of Wisconsin, before the Hon. Charles E. Dyer, district judge, sitting as circuit judge.

And thereupon came, as well, said plaintiff by Finches, Lynde & Miller, his attorneys, and the said defendant by John W. Cary, its attorney, and a jury was duly called, sworn, and empanneled.

And thereupon the said plaintiff, to maintain the issue on his part, offered in evidence a deed from the sheriff of Milwaukee County, bearing date June 13th, 1862, and recorded in the office of the register of deeds of Milwaukee Co., Nov. 20th, 1863, at 1.30 p. m., a copy of which is as follows:

15 *Sheriff of Milwaukee Co. to Chas. Howard.—Deed.*

This indenture, made the thirteenth day of June, A. D. 1862, between Charles H. Larkin, sheriff of Milwaukee County, State of Wisconsin, of the first part, and Charles Howard, of the city of New York, of the second part:

Whereas by virtue of a certain execution issued out of the circuit court for the county of Milwaukee to Herman L. Page, the then sheriff, directed and delivered, tested October 29, 1858, and commanding him that of the goods and chattels of the said defendant The La Crosse & Milwaukee Railroad Company he should cause to be made certain moneys in the said writ specified, and if sufficient goods and chattels could not be found, then that he should cause the amount so specified to be made of the real estate which said defendant had on the day in the said writ mentioned, to wit, on the first day of May, 1858, or at any time afterwards, in whose hands soever the same might be, as by the said writ of execution, reference being thereunto had, more fully appears. And whereas after the coming in of the said writ to said sheriff, and before the return day thereof, the then sheriff did, by virtue of writ. levy on, seize, and take the lands hereinafter particularly described, and for want of goods and chattels in his bailiwick of the said La Crosse and Milwaukee Railroad Company to satisfy the said damages
16 and costs mentioned in said writ, sold the said lands as hereinafter mentioned, at public auction at the court-house in the city of Milwaukee, on the fifteenth day of January, A. D. 1859, having first given public notice of the time and place of such sale, by causing a notice thereof to be published in a public newspaper, published in said county once in each week for six weeks successively next preceding said day of sale, and by affixing up in three public places in the said town where the premises are situated three notices of sale; said notices so published in said newspaper and posted up as aforesaid, containing an intelligible description of the land so to be sold, together with the time and place of such sale, to Sebre Howard for the sum of seven thousand five hundred dollars, he being the highest and best bidder therefor, and that being the highest sum bid for the same;

And whereas upon the said sale the said sheriff made out and described duplicate certificates of sale, containing a particular description of the premises sold, the price bid for the same, the whole consideration money paid, and the time when such sale would become absolute and the purchaser would be entitled to a conveyance pursuant to law, one of which duplicate certificates was within ten days after the sale of said land filed in the office of the register of deeds for the said county of Milwaukee, as appears from said certificate now on file, and the
17 other was delivered to the said purchaser;

And whereas the said Sebre Howard did, on the 6th day of April, 1861, at the city of New York, for a valuable consideration, sell, assign, and set over to the said Charles Howard, of the same place, the said judgment against the said defendant The La Crosse & Milwaukee Railroad Company, and all the rights of the said Sebre Howard to all the property described in said certificate as bid off to him, the said Sebre Howard, as appears by an assignment made and a certified copy of certificate now on file with the original certificate in the office of the register of deeds of Milwaukee County, reference being thereunto had, will more fully appear;

And whereas the said premises after the expiration of twenty-seven months from the time of the said sale remain unredeemed, and no

creditor of the said La Crosse and Milwaukee Railroad Company has acquired the right or title of the said purchaser:

Now, therefore, know ye that I, the said Charles H. Larkin, sheriff aforesaid, by virtue of the said writ of execution, and of the statute in such case made and provided, and in consideration of the said sum of seven thousand five hundred dollars to my predecessor in hand paid by the said Sebre Howard, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said Charles Howard, and to his heirs and
18 assigns forever, all the right, title, and interest which the said defendant The La Crosse and Milwaukee Railroad Company had on the first day of May, 1858, or has since acquired, in and to the following described property, to wit:

Lots one, three, and four, in block one; lots one, four, seven, and eight, in block thirteen; lots nine, eleven, and twelve, in block fifteen; lots four, eleven, and twelve, in block sixteen; lot six, in block nineteen; lots five and thirteen, in block twenty; lot seven, in block twenty-one; lots eight and sixteen, in block twenty-two; lots one, three, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen, in block thirty; all in the sixth ward of the city of Milwaukee.

Also, lots one and two, and all of lot three except the south sixty feet, in block thirty-three; lots two, three, four, seven, eight, nine, and the south half of lot six; all that part of the north half of lot five which lies east of a line beginning at a point on the north line of said lot twenty-six feet and six inches east of the east line of Third street, or west line of said lot, running thence somewhat east of the south to a point distant thirty-four feet six inches from said street, in block forty.

Also, all that part of lot one which lies west of a straight line drawn from a point in the south line of said lot sixteen feet east from the west side of said lot to a point in the north line of said lot eight and one-half feet from the west line of said lot, in block forty.

Also, lot ten, excepting and reserving from this grant that part
19 which Jabez K. Botsford once conveyed to F. C. Lackner, being a strip from off the north side of said lot twenty feet wide and running east seventy-five feet, in block forty; lots one, two, three, four, five, six, seven, eight, nine, and ten, in block forty-one; all in the second ward of the city of Milwaukee.

Also, lots seven and eight, and part of lots five and six, in block thirty-three, in Sherman's addition; that part of lot four which lies east of the La Crosse and Milwaukee Railroad, in block forty-seven; lot one, block forty-eight; that part of the reserved acre in Sherman's addition which lies east of the right of way of said La Crosse & Milwaukee Railroad; all in Sherman's addition, in the sixth ward of the city of Milwaukee; lots five, six, seven, eighteen, nineteen, forty, forty-one, forty-two, forty-three, forty-eight, fifty, fifty-one, fifty-nine, sixty, sixty-nine, seventy-one, seventy-two, seventy-three, seventy-four, eighty-four, eighty-eight, being canal lots (so called).

Also, Byron Kilbourn's interest in a part of the island extending below Point street, in lot one, section twenty, township seven, range twenty-two.

Also, five (5) and forty-three one-thousandths of an acre in lot eighty-three of the subdivision of lots two and three, section twenty-first, township seven, range twenty-two; all in the sixth ward of the city of Milwaukee.

Also, lots four and five, in block fifty, in the seventh ward, all situate, lying and being in the city of Milwaukee, in the county of Mil-

20 waukee, and State of Wisconsin, with the appurtenances and all the estate, right, title, and interest which the said La Crosse & Milwaukee Railroad Company had in the said premises on the first day of May, A. D. 1858, up to the day of the sale thereof:

To have and to hold the said land and premises, and every part thereof, with the appurtenances, unto the said Charles Howard, his heirs and assigns, forever, as fully and absolutely as I, the said sheriff aforesaid, and under the authority aforesaid, might, could, or ought to sell and convey the same. In witness whereof the said party of the first part, sheriff as aforesaid, hath hereunto set his hand and seal the day and year first above written.

[SEAL.] CHARLES H. LARKIN,
Sheriff of Mil. Co., Wis.

In presence of—
ROBERT WASON, JR.
JOHN W. DUNLAP.

STATE OF WISCONSIN,
Milwaukee County, ss:

Be it remembered that on the fourteenth day of June, A. D. 1862, appeared before me the above named Charles H. Larkin, sheriff of Milwaukee County, to me known as the grantor in the foregoing deed, and acknowledged the execution of the same for the uses and purposes therein set forth.

Recorded November 20th, 1863, at 1½ o'clock p. m.
ROBERT WASON, JR.,
Justice of the Peace in & for Mil. Co., Wis.

21 STATE OF WISCONSIN,
Milwaukee County, ss:

I, John B. Stemper, register of deeds in and for said county, hereby certify that the foregoing is a true and correct transcript from the records in my office as recorded in volume 79 of deeds, pages 198–200; that I have carefully compared the same with said records, and that it is the whole thereof.

In testimony whereof I have hereunto set my hand and affixed my official seal this 8th day of October, 1869.

[SEAL.] J. B. STEMPER, *Register*,
By FRED. SCHLOEMILCH, *Deputy.*

Said plaintiff further offered in evidence the record of a suit in the circuit court of Milwaukee Co., wherein Sebre Howard is plaintiff and The La Crosse & Milwaukee Railroad Company defendant.

Said suit was commenced on the 30th day of January, 1858. Summons was logally served on the same day on the defendant in the suit. The suit was brought upon a promissory note, bearing date on the 1st day of July, 1857, executed by the defendant, payable to its order, and payable six months after date, for the sum of $25,000.00. There was no appearance by the defendant. A judgment was recovered
22 against the defendant in that suit on the 1st day of May, 1858, for $25,586.78, and the judgment docketed May 1st, 1858, at 12 o'clock m. Execution was issued in due form of law on the judgment, on the 29th day of October, 1858, and delivered to the sheriff of Milwaukee County, and under that execution, and by virtue thereof, the said sheriff, on the 29th day of October, 1858, seized and levied upon all the lots and blocks and the real estate described in the complaint in

the above-entitled cause, and duly advertised the sale according to law, and the said lots and blocks and real estate was sold according to law, a certificate of sale was given according to law, and the property not having been redeemed, as provided by law, the deed hereinbefore stated was executed and delivered to the plaintiff in this suit.

It was admitted by the defendant that the Milwaukee & St. Paul R. R. Company was in possession of all of the real estate described in the complaint, at the time of the commencement of this suit, except the lots and blocks situated east of the canal, as shown in the map Exhibit A, and as to which said lots and blocks the said defendant disclaimed any interest in or to the same.

It was further stated by the attorney for the defendant, that the following parcels of property were not acquired by the defendant from the La Crosse R. R. Co., namely, lot 8, block 41; half of lot 4, block 41; lots 8 and 16, block 22. As to all the other property described
23 in the complaint, it was admitted that the defendant acquired the title to the same from the La Crosse & Milwaukee R. R. Co; that the title to the same was in the La Crosse and Milwaukee R. R. Co., at the date of the rendition of the said judgment of Sebre Howard against the said Lacross & Milwaukee R. R. Co., of the date of May 1st, 1858.

And it was further admitted that the property in suit was worth at least $100,000.00; that the value of the mesne profits for six years preceding the commencement of this suit was at least $1,000.00.

And thereupon the said plaintiff rested his case.

The defendant, to maintain the issue on his part, offered in evidence the following mortgages, judgments, leases, and conveyances, to wit:

First. A mortgage from the La Crosse & Milwaukee R. R. Co. to Wm. Barnes, bearing date the 21st day of June, A. D. 1858, given to secure the issue of bonds, $2,000,000 in the aggregate, embracing 1,000 bonds of $1,000 each; 1,400 bonds of $500 each, and 3,000 bonds of $100 each, with interest warrants attached, and granting to the said Barnes, as trustee, all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about 200 miles, with all and singular all of the tracts, pieces, and parcels of land which now are, or hereafter may be, or constitute the site of the roadways, turn-outs, engine-houses, work-shops,
24 depots, and other buildings, and all the other lands and real estate which now constitute or may hereafter constitute, or be a part of or appertain to said railroad, together with all its engine-houses, work-shops, depots, and other buildings, its locomotive-engines, rolling-stock, and all other equipments of every kind and description, and all the materials, tools, implements, and utensils, and other personal property, and all the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroad, from Milwaukee to La Crosse.

It was further provided among other things that in case of a default for the space of fifteen days in the payment of any of said interest warrants or coupons, or in the payment at maturity of the principal sum mentioned in any of said bonds, said trustee was authorized to take possession of the railroad and property conveyed, and to take and receive the income and profits thereof, and to sell the same with the rights, liberties, privileges, and franchises at public or private sale, and to deliver to the purchaser deeds and conveyances thereof, which shall be sufficient to vest all the right, title, and interest, legal or equitable, of the said trustee and said railroad co. in the purchaser, and give to the pur-

chaser all the rights, liberties, privileges, and franchises and every part and parcel thereof in said mortgage mentioned. But before any
25 sale should be made at auction, notice thereof should be published once in each week for three weeks, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be required by the laws of the State of Wisconsin, the same should be given.

In case of default in payment of principal or interest, then the trustee on the written request of holders of bonds to the amount in the aggregate of $100,000, should proceed to make such sale and conveyance. Said mortgage was duly witnessed and acknowledged so as to entitle it to be recorded, and the same was recorded July 8th, 1858, at 8 o'clock a. m.

And to the reading of which said mortgage said plaintiff by his said counsel did then and there object on the ground that it was executed subsequent to the rendition of the judgment of Sebre Howard against the said railroad co., to wit, subsequent to May 1st, 1858, and that no proceeding under said mortgage could be taken which would in any way impair, cut off, or destroy the lien of said judgment as of the date of May 1st, 1858.

Which said objection was then and there overruled, the said mortgage allowed to be read in evidence, and to which said ruling and decision said plaintiff by his said counsel did then and there except.

26 Second. Said defendant offered in evidence a supplement to the said mortgage, bearing date on the 11th day of August, 1858; which said supplement also mortgaged the railroad of said company, commencing in the city of Milwaukee and running from thence to La Crosse, a distance of about 200 miles, and also the railroad of said company commencing in the village of Madison and running from thence by way of Portage City to the St. Croix River or lake, a distance of about 268 miles, and also the railroad of said company commencing in the village of Columbus and running to Portage City, a distance of about 40 miles, a part of which roads have been constructed and are now in full operation and the residue are in process of construction, and all other railroads built or to be built by said La Crosse & Milwaukee R. R. Co., together with all the property real and personal, and franchises, privileges, and immunities.

Which said supplement was duly witnessed and acknowledged so as to entitle it to be recorded, and the same was recorded on the 1st day of September, 1858, at 8 o'clock a. m.

And to the reading of which said supplement in evidence the said plaintiff, by his said counsel, did then and there object, for the same reason that they objected to the original mortgage, which objection was then and there overruled and said supplement admitted in evidence,
27 and to which said ruling and decision of the said judge the said plaintiff, by his said counsel, did then and there except.

Third. Said defendant further offered in evidence the proceedings to foreclose the said mortgages to Barnes, together with the articles of organization of the Milwaukee & Minnesota R. R. Co., as follows, the request of bondholders exceeding $100,000 in amount to foreclose said mortgage.

First. Affidavit of one L. L. Crounse that he is one of the publishers of the Milwaukee Free Democrat, a newspaper published in the city of Milwaukee, and that a notice, of which the one annexed is a true copy, was duly published in such newspaper once in each week for four consecutive weeks, commencing on the 24th day of February, A. D. 1859,

and ending on the 24th day of March, A. D. 1859, which said notice is in the words and figures following, to wit:

Whereas the La Cross & Milwaukee Railroad Company, a cor-(advertisement 7)poration duly constituted by the laws of the State of Wisconsin, on the 21st day of June, A. D. 1858, duly executed to the undersigned a mortgage deed for the purpose of securing the payment of bonds to the amount of two millions of dollars, with interest-coupons thereto attached, which was recorded (advertisement 8) in the office of the secretary of state of the State of Wisconsin, in the book of railroad mortgages, on pages 342 to 348 inclusive, on the 8th day of July, 1858.

28 And whereas also the said La Crosse & Milwaukee Railroad Company, on the 11th day of August, 1858, duly executed to the undersigned a supplementary mortgage or trust deed for the purpose aforesaid, which was recorded in the office of the secretary of state of the State of Wisconsin, in the book of railroad mortgages, on pages 349 to 361 inclusive, on the 1st day of September, 1858, whereby all and singular the railroad of said company, commencing in the city of Milwaukee and running from thence to La Crosse, [387] in said State, a distance of about 200 miles, constructed and to be constructed; and also all the railroad of said company commencing in the village of Madison, in said State, and running from thence by way of Portage City to the St. Croix River or Lake, in said State, a distance of about two hundred and sixty-eight miles, constructed and to be constructed; and also all the railroad of said company commencing in the village of Columbus, in said State, and running from thence to Portage City, in said State, a distance of about forty miles, constructed and to be constructed, and all other railroad built or to be built and constructed by said company, or which they have a right to construct by or under any corporate or other rights, privileges, or franchises granted or given to said company by the legislature of the State of Wisconsin or from any other source, or in any other manner whatever, including

29 all and singular the several tracts, pieces or parcels of land, which constituted or might hereafter constitute the site of the roadways, turnouts, engine-houses, workshops, depots and other buildings, and all the other lands and real estate which constituted (advertisement 9) or might hereafter constitute or be a part of or appertain to said railroad, and including also all and singular the lots, lands, and real estate whatsoever which the said company owned or might thereafter acquire by purchase, grant, gift, or otherwise in the cities of Milwaukee and La Crosse or in the vicinity of either of said cities, and all improvements made or thereafter to be made thereon, and all rights of wharfage and dockage, and all other riparian rights and privileges and franchises appertaining thereto, as particularly described in the various deeds of the same to said company; and also all and singular the superstructure of said railroads, whether then made and constructed or thereafter to be constructed, and all the engine-houses, workshops, depots and other buildings, and all the other improvements on or appertaining to said railroads, built or thereafter to be built and constructed, and also all and singular the locomotive-engines and other rolling-stock and all the other equipments of every kind and description procured or thereafter to be procured for or used on said railroads, and all the materials, tools,

30 implements and utensils and other personal property procured or thereafter to be procured for or in connection with said railroads; and also all and singular the rights, liberties, privileges, and franchises of

the said La Crosse & Milwaukee Railroad Company of every kind and description; and also all and singular the lands granted or intended to be granted to the said La Crosse and Milwaukee Railroad Company, under and by virtue of the act of Congress approved June 3rd, 1856, entitled "An act granting public [388] lands to the State of Wisconsin to aid in the construction of railroads in said State," and the act of the legislature of the State of Wisconsin, approved October 11th, 1856, entitled "An act to grant certain lands to the La (advertisement 10) Crosse & Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3rd, 1856, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to said lands; and also all and singular the bonds, bills of exchange, promissory notes, accounts, causes of action, demands, and choses in action, of whatever nature, owned wholly or in part by said railroad company, on such day as the said railroad company might first make default in the payment of the principal or interest which might thereafter
31 become due on any of the said bonds issued by said company under said trust deed or mortgages, and all the property, real, personal and mixed, of said railroad company then acquired and vested, or thereafter to be acquired and vested, together with all the rights, liberties, privileges and franchises of said railroad company, as fully and amply as if said railroads had been entirely built, constructed and equipped, and the particular lands granted by the foregoing acts of Congress and the legislature of the State of Wisconsin, fully designated and duly patented and conveyed to said railroad company according to the provisions of the said acts, were conveyed to the undersigned to be held by him in trust for and as security to the bondholders of said company for the payment of the said bonds, with interest thereon, secured by said mortgage deeds.

And whereas by said trust or mortgage deeds it was provided that if said railroad company should make default for the space of fifteen days in the payment of any of the interest warrants or coupons accompanying the said bonds as they respectively became due, or if default for the like period should be made in the payment at maturity of the principal sum of money mentioned in any of the said bonds secured by said mortgage deeds, then, and in either of said cases, the undersigned, as trustee, was authorized in his discretion to enter into and take
32 possession of all and singular the railroads and all the other property, real, personal and mixed, covered or conveyed or intended to be covered or conveyed by said trust deeds, with all the rights, liberties, privileges and franchises of said company, and to take and receive the income and profits thereof, and to sell all and singular said railroads and said other property, real, personal and mixed, with all the rights, liberties, privileges and franchises of said railroad company covered and conveyed or intended to be covered and conveyed by said mortgage deeds, either at public or private sale, and also that, on the written request of the holder or holders of said bonds then outstanding to the amount in the aggregate of one hundred thousand dollars, the undersigned should proceed to make such sales and conveyances for the purpose of paying the said outstanding bonds and the interest thereon.

But in case of any sale at auction, it was provided that notice of such intended sale should be published once in each week for three weeks at least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and that on such sale

the undersigned should execute and deliver to the purchaser or purchasers deeds and conveyances which should vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of the undersigned trustee and said railroad company
33 of, in, and to the said property, rights, privileges, liberties, and franchises, and every part and parcel thereof.

And whereas the interest that became due on the 1st day of January, 1859, upon all the bonds issued by said company, secured by the mortgage deeds aforesaid, amounting to the sum of about seventy thousand dollars, was not paid by said company when it became due, and said company having made default in such payment for the space of more than fifteen days; and whereas, also, holders of said outstanding bonds, amounting in the aggregate to the sum of over one hundred thousand dollars, had duly requested in writing, in compliance with said mortgage deeds, that the undersigned should proceed to make such sales and conveyances as aforesaid:

Now, therefore, notice is hereby given that in pursuance of the authority vested in the undersigned by said mortgage deeds, I shall expose for sale at auction, to the highest bidder, in conformity to law, at the court-house in the city of Milwaukee, in said State, on the 29th of March, A. D. 1859, at 12 o'clock m. of that day, all and singular the said railroad and real, personal, and other property of whatsoever nature, covered by said trust-deeds, together with all the said rights, privileges, and franchises appertaining thereto, and also all the corporate and
34 other rights, privileges, and franchises of said La Crosse and Milwaukee Railroad Company, which may be included in, covered, and conveyed, or intended to be covered and conveyed by said mortgage deeds, in order to pay the (advertisement 13) said outstanding bonds and interest, and the costs and expenses of this sale.

Dated Albany, February 24th, 1859.

WILLIAM BARNES,
Trustee.

Second. Adjournments of the said sale from time to time were duly had until the 21st day of May, A. D. 1859, at which time said sale took place according to the terms of said advertisement, and the said William Barnes, the said trustee, became the successful bidder and purchaser at such sale in trust for bondholders, in conformity to the laws of the State of Wisconsin, and to the provisions of the act approved by the governor of said State on the 8th day of February, 1859, entitled "An act supplemental to chapter 79 of the Revised Statutes, entitled 'of railroads,'" for the price or sum of one million five hundred and ninety-three thousand three hundred and thirty-three dollars and thirty-three cents ($1,593,333.33).

Third. Proof of the publication of the notice of sale in the New York Times, a newspaper published in the city of New York.

Fourth. The articles of organization of the Milwaukee & Min-
35 nesota Railroad Company. These articles recite at length the execution of the mortgage to Barnes, also the supplemental mortgage, the failure to pay the interest warrants or coupons as they became due; that more than fifteen days had elapsed, and that holders of bonds in the aggregate to the sum of over $100,000 had requested in writing in compliance with said mortgage, that the said trustee should proceed to make said sale and conveyance; publication of the notice of sale once in each week for three weeks, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee;

the sale at the time and place fixed in said notices, and the adjournments; that Barnes, the trustee, became the bidder and purchaser at the said sum of $1,593,333.33, being seventy-five per cent. of the amount due for principal and interest on the bonds outstanding, and that he was the highest and best bidder at said sale. And further reciting that the said Barnes, as such purchaser, does declare that his title acquired by the said purchase, to said railroads, its property and franchises, was taken and held by him in trust for the holders of the bonds secured by the said mortgage or trust deeds. That the said Barnes and the holders of the said bonds executing the said articles of organization, proceed to organize anew, and to elect directors, and that they thereby
36 organize themselves anew as a corporation or body corporate in the name of the Milwaukee and Minnesota Railroad Company, and by that corporate name to have and possess all the rights, powers, privileges, and franchises granted to or conferred upon the La Crosse and Milwaukee Railroad Company.

And to the reading of which said proceedings to foreclose said mortgages, together with the said articles of organization of the Milwaukee and Minnesota Railroad Company, the said plaintiff did then and there object, for the reason that the said mortgage and the supplement thereto, and all proceedings under said mortgage and supplement are subsequent to the date of the rendition of the judgment of Sebre Howard against the La Crosse & Milwaukee Railroad Company, and that no title could be acquired under such proceedings which would in any way affect or impair the title of the said Sebre Howard or the plaintiff in this suit.

And for the further reason that there was no power to foreclose said mortgage by advertisement.

And for the further reason that the property was bid in on said sale by Barnes, the trustee, and that there was no valid law of the State of Wisconsin in existence at the time the bid was made which would authorize or permit the said Barnes to bid in the said premises un-
37 der that mortgage and those proceedings in his own name.

Which objections were then and there overruled by the said judge; and the said foreclosure proceedings and the said "articles of organization" were allowed to be read in evidence, and were read in evidence, and to which said ruling and decision said plaintiff, by his said counsel, did then and there except.

Third. Said defendant's counsel further offered in evidence a mortgage executed by the La Crosse and Milwaukee Railroad Company to Francis A. Palmer, dated June 30th, 1854; said mortgage was given to secure the payment of 500 bonds of $1,000.00 each, and of 900 bonds for the sum of $500.00 each, and mortgaged all the road of the La Crosse Road from its eastern termination, in the city of Milwaukee, to Portage City, in the county of Columbia, being ninety five miles in distance, together with all its rights, privileges, and property of every description.

Said plaintiff, by his said counsel, did then and there object to the reading of the said mortgage, as irrelevant and incompetent evidence to defeat the legal title of the plaintiff; and because the counsel for the defendant does not propose to follow it up with proof that said mortgage has ever been foreclosed, and the equity of redemption cut off by any proceeding whatever.

38 Which said objection was then and there overruled, and said mortgage allowed to be read, and was read in evidence, and to

which said ruling and decision the said plaintiff, by his said counsel, did then and there except.

Fourth. Said defendant further offered in evidence a supplemental mortgage to the same party for $950,000, dated February 18th, 1856, covering the same property.

(Objected to for the same reason as the last above described mortgage.)

Objection overruled, mortgage read in evidence, and the plaintiff, by his counsel, did then and there except.

Fifth. Defendant's counsel further offered in evidence a mortgage from the La Crosse Co. to Bronson, Soutter & Knapp, given to secure four million of dollars, dated December 31st, 1856; mortgaging the line of the La Crosse road from Portage City to La Crosse, together with all its property and franchises and rolling stock.

To which said mortgage said plaintiff, by his said counsel, did then and there object, for the reason that the same is irrelevant and incompetent; which objection was overruled, mortgage read, and to which ruling the plaintiff, by his said counsel, did then and there except.

Sixth. Defendant's counsel offers in evidence a mortgage of the Milwaukee & Green Bay and Fond du Lac Railroad to the city of
39 Milwaukee, bearing date the 1st day of September, 1853, running to Alexander H. Johnson, treasurer of the city of Milwaukee, to secure the payment of $200,000.00, and which said mortgage mortgages the first 18 miles of said road, commencing at the terminus of said railroad in the said city of Milwaukee, and extending northwesterly on the line of said road to a point 40 miles distant from the said city of Milwaukee, in the State of Wisconsin, together with all its property, franchises, &c.

To the reading of which said mortgage said plaintiff, by his said counsel, did then and there object, for the reason the same was irrelevant, incompetent, and immaterial; which objection was then and there overruled, said mortgage was allowed to be read, and was read, and to which ruling and decision of said judge said plaintiff, by his said counsel, did then and there except.

Seventh. Said defendant, by his said counsel, further offered in evidence a mortgage from the La Crosse and Milwaukee Railroad Co. to the city of Milwaukee, dated the 13th day of July, 1854, for $200,000.00. Said mortgage covers the first 40 miles of the road, commencing at the point where it leaves the line heretofore adopted by the Milwaukee, Fond du Lac & Green Bay Railroad, in the county of Washington; thence westerly to the town of Beaver Dam.

Same objection by the counsel of the plaintiff.

40 Objection overruled. Said mortgage read in evidence. To which ruling said plaintiff, by his said counsel, did then and there except.

Eighth. Said defendant's counsel further offered in evidence a mortgage from the said railroad company to Bronson & Soutter, to secure the amount of $1,000,000, dated on the 17th day of August, 1857, and mortgages the entire road and property of the road from the city of Milwaukee to the city of Portage.

To the reading of which said mortgage said plaintiff, by his said counsel, did then and there object as irrelevant, and incompetent, and immaterial.

Objection overruled, mortgage read in evidence, and to which said ruling said plaintiff, by his said counsel, did then and there except.

Ninth. Said defendants' counsel further offered in evidence a lease executed by said railroad company to Selah Chamberlain, bearing date the 26th day of September, 1857. Said lease leases the whole line of the road from Milwaukee to La Crosse. Said lease recites that said Chamberlain, from and after the 30th day of September, in the year 1857, is to have the possession for an indefinite term of time of said railroad route from the city of Milwaukee to the city of La Crosse, together with its right of way, and property, and franchises, subject to superior liens thereon, and to existing contracts or agreements
41 with any other company whose railroad connects with the La Crosse and Milwaukee Railroad. That he shall operate the said road from said date until said agreement shall be terminated in such a manner as to produce the largest amount of net receipts. That he is to keep the rolling stock in thorough repair, and that, if it shall be found for the interest of the company, he may buy additional rolling stock and appropriate the receipts of said railroad to the payment of the same. That he is to apply the earnings to the payment of all coupons to become due on the $950,000 of the bonds of said company. Second, to the payment of the coupons to become due on the $114,000.00 of bonds secured by a mortgage to the city of Milwaukee. Third, to the payment of all coupons to become due on the $200,000.00 of the bonds of the city of Milwaukee, issued to the Milwaukee and La Crosse Railroad Co., secured by the mortgage of the 30th of July, 1854. Fourth, to the payment of all coupons to become due on the $1,000,000.00 of the bonds of the said railroad company, secured by mortgage or deed of trust on the railroad from Milwaukee to Portage City, and from Watertown to Midland. Fifth, from the balance of the said net receipts to pay certain amounts due to him, said Chamberlain, for the
42 contract for building the road between New Lisbon and La Crosse; and that upon such payment being made he will deliver back said railroad to the party of the first part.

To the reading of which said lease in evidence said plaintiff, by said counsel, did then and there object, for the reason that the same was irrelevant, incompetent, and immaterial; which objection was then and there overruled, said lease was read in evidence, and to which said ruling, said plaintiff, by his said counsel, did then and there except.

Tenth. Said defendant, by his said counsel, further offered in evidence a judgment in favor of Selah Chamberlain against the La Crosse Co., which was recovered on the second day of October, 1857, for $628,000.00.

Which said judgment, said plaintiff, by his said counsel, did then and there object, on the ground that the same was irrelevant, incompetent, and immaterial; which said objection was then and there overruled, said judgment read in evidence, and to which said ruling, said plaintiff, by his said counsel, did then and there except.

Eleventh. Said defendant, by his said counsel, further offered in evidence a judgment in favor of Newcomb Cleveland against the said railroad company, docketed on the 7th day of October, 1857, for the sum of $111,727.71 cents damages, and $544.15 costs.

43 To the reading of which said judgment in evidence, said plaintiff, by his said counsel, did then and there object, for the reason that the same was irrelevant, incompetent, and immaterial; which objection was then and there overruled, said judgment read in evidence, and to which said ruling said plaintiff, by his said counsel, did then and there except.

Twelfth. Said defendant further offered in evidence an assignment of said judgment by Newcomb Cleveland to James B. Cross, dated 2nd day of March, 1858, and also an assignment by James B. Cross of the said judgment to Selah Chamberlain, said assignment bearing date May 15, 1861. And also an assignment by Selah Chamberlain to the defendant, bearing date the 29th day of June, 1863. Also a resolution of the Milwaukee & St. Paul Company, passed July 8th, 1864, authorizing the president to sell the said judgment to Fred. P. James, and the assignment of this judgment to Fred. P. James, dated July 8th, 1864; which said four assignments are in the words and figures following, to wit:

This indenture, made the second day of March, eighteen hundred and fifty-eight, between Newcomb Cleveland, of Waukegan, in the State of Illinois, of the one part, and James B. Cross, of the city & county of Milwaukee, of the other part.

44 Whereas, the said Newcomb Cleveland did, on the seventh day of October, in the year eighteen hundred and fifty-seven, recover by judgment in the district court of the United States for the district of Wisconsin, against the La Crosse & Milwaukee Railroad Company, the sum of one hundred and eleven thousand seven hundred and twenty-seven dollars and seventy-one cents, for his damages, besides costs taxed in said suit at the sum of five hundred and forty-four dollars and fifteen cents, as by the record thereof, now remaining in said court, may appear.

Now, this indenture witnesseth, that for and in consideration of the sum of one hundred and twenty-four thousand and five dollars and forty-nine cents, to him, the said Newcomb Cleveland, in hand paid by the said James B. Cross, the receipt whereof is hereby acknowledged, he, the said Newcomb Cleveland, hath granted, bargained, sold, assigned, transferred, and set over unto the said James B. Cross, his executors, administrators, and assigns, the said judgment so recove'd as aforesaid against the said La Crosse & Milwaukee Railroad Company, and all the benefit and advantage, sum and sums of money that may be had, obtained, or gotten by reason or means of the said judgment, or any proceedings heretofore had and instituted, or to be had thereupon.

And the said Newcomb Cleveland does hereby covenant with the
45 said James B. Cross that no part of the said judgment, or the interest or costs thereon, has been paid; and the said Newcomb Cleveland does hereby authorize and empower the said James B. Cross and his representatives or assigns, in the name of the said Cleveland or otherwise, to demand, sue for, recover, receive, and enjoy the moneys due and to be due as aforesaid, and for that purpose to avail himself of any proceedings heretofore instituted by said Cleveland or otherwise.

But this assignment is made and taken, in all other respects, at the risk of the said James B. Cross and his assigns, who is to collect the same at his own expense, and not to subject the said Newcomb Cleveland to the payment of any costs or charges whatever.

N. CLEVELAND. [L. S.]

In presence of—
A. M. FINCH.

For and in consideration of the release and discharge of myself and Clark Shepardson from all liability undertaken by myself or Shepardson in the purchase by me of the judgment described in the foregoing assignment, viz, a judgment rendered in the district court of the
46 United States for the district of Wisconsin, in the name of New-

comb Cleveland, against the La Crosse & Milwaukee Railroad Company, on or about the 7th day of October, 1857, for the sum of one hundred and eleven thousand seven hundred and twenty-seven dollars and seventy-one cents, besides costs, and of one dollar to me, in hand paid, I, James B. Cross, of Milwaukee, do hereby sell, assign, transfer, and set over to Selah Chamberlain, of Cleveland, Ohio, the said judgment and everything pertaining thereto, and do hereby authorize said Chamberlain to collect, demand, and receive the same at his own cost and expense.

JAMES B. CROSS. [L. S.]

Dated Milwaukee, May 15th, 1861.

The district court of the United States for the district of Wisconsin.

NEWCOMB CLEVELAND
vs.
THE LA CROSSE & MILWAUKEE RAILROAD COMPANY.

140. Judgment docketed Oct. 7th, 1857, for $111,727.71 damages, besides costs,

In consideration of the bond of the Milwaukee and St. Paul Railway Company for the payment to me of eighty-nine thousand one hundred and thirty-seven and $\frac{75}{100}$ ($89,137 $\frac{75}{100}$) dollars, with interest from the first day of July, 1862, bearing even date herewith and payable from
47 the net earnings of said company after the provision for the payment of the interest upon the first mortgage bonds of said railway company, I, Selah Chamberlain, of Cleveland, Ohio, assignee of the above-mentioned judgment, do hereby sell, assign, and set over to said railway company all my right, title, and interest in and to said judgment, for its use and benefit, and at its risks, costs, and charges.

This assignment, however, is made and accepted upon the express understanding and agreement that until the said obligation of said railway company given for the purchase of said judgment shall be fully paid, the said Chamberlain may take and use all proper and lawful means to enforce the collection of the balance due upon said judgment, and receive and apply whatever moneys may be realized from or by virtue of said judgment so far as may be requisite or necessary towards the payment of said obligation of said railway company.

In witness whereof I have hereunto set my hand and seal this 29th day of June, 1863.

SELAH CHAMBERLAIN. [SEAL.]

[5c. int. rev. stamp cancelled.]

At a meeting of the board of directors of the Milwaukee and St. Paul Railway Company, had July 8th, 1864, the following resolution was passed:

48 Resolved, That the president is hereby authorized to sell to F. P. James, or any one else, on such terms as he thinks for the interest of the company, the judgments owned by this company against the La Crosse & Milwaukee Railroad Company known as the Mercantile Bank judgment, Sebre Howard judgment, and Newcomb Cleveland judgment.

I certify the above to be a true copy from the directors' records.

[L. S.] ALANSON CARY,
Secretary.

In consideration of fifty thousand dollars received to our full satisfaction of F. P. James, we hereby sell and assign to him the judgment owned by us against the La Crosse and Milwaukee Railroad Company, known as the Mercantile Bank judgment and Newcomb Cleveland judgment.

New York, July 8th, 1864.

MILWAUKEE & ST. PAUL RAILROAD COMPANY,
By RUSSELL SAGE, *President.*

And the defendants' counsel further offered in evidence in the same connection the record of a certain suit instituted by the said Fred. P. James on the 18th day of April, 1866, in the circuit court of the United States for the district of Wisconsin against the Milwaukee & Minnesota Railroad Company. This was a proceeding in equity; the bill
49 was filed on the 18th day of April, 1866, and is as follows:

To the judges of the circuit court of the United States for the district of Wisconsin:

Frederic P. James, of the city of New York, and a citizen of the State of New York, brings this his bill against the Milwaukee and Minnesota Railroad Company, a corporation created by the laws of the State of Wisconsin and having its principal office of business in the city of Milwaukee and a citizen of the State of Wisconsin.

And thereupon your orator complains and says that heretofore, to wit, on the seventh day of October, 1857, in the district court of the United States for the district of Wisconsin, before the judge thereof, by the consideration and judgment of said court, Newcomb Cleveland, of Waukegan, and a citizen of the State of Illinois, recovered against the La Crosse & Milwaukee Railroad Company, a corporation created by the laws of the State of Wisconsin, a judgment for the sum of one hundred and eleven thousand seven hundred and twenty-seven dollars and seventy-one cents damages, and five hundred and forty-four dollars and fifteen cents costs, which judgment was then and there duly entered and docketed, whereof the said La Crosse & Milwaukee Railroad Company was convicted, as by the record of said judgment remaining in
50 the office of the clerk of this court will more fully appear, and to which for greater certainty your orator prays leave to refer.

Your orator further shows and complains that by mesne assignment, that is to say, by assignment from said Cleveland to Selah Chamberlain, of Cleveland, Ohio, and by assignment from said Chamberlain to your orator, he has become and now is the lawful owner and holder of said judgment, and that the same now remains in force, unsatisfied, for the sum of seventy-six thousand five hundred and twenty-six dollars and thirty-nine cents, principal, and interest thereon from the 28th day of November, which sum is unpaid and justly due to your orator.

Your orator further shows and complains that at the entry and docketing of said judgment the La Crosse & Milwaukee Railroad Company owned and was possessed of a railroad and appurtenances known as the La Crosse and Milwaukee Railroad, extending from Milwaukee to La Crosse, in the district of Wisconsin, in two divisions, that from Milwaukee to Portage City being known as the eastern division, that from Portage City to La Crosse being known as the western division, upon which railroad and appurtenances your orator is advised said judgment at its entry and docket became and was a lien, and so expressly charges the law and fact to be.

51 Your orator further shows that he is informed and believes that subsequently to the entry and docket of his said judgment the said La Crosse and Milwaukee Railroad Company, on the 21st June, 1858, mortgaged to William Barnes in trust the said railroad to secure an issue of bonds to the amount of two millions of dollars, to which it on the 11th August, 1858, made and executed a supplementary mortgage of said railroad.

Your orator further shows that he is informed and believes that the said Barnes made a pretended foreclosure by advertisement of said mortgage and supplement, who went through the form of organizing, pretending and assuming so to do under and by virtue of the laws of the State of Wisconsin, a new corporation, and took the name of the Milwaukee & Minnesota Railroad Company, and received from said Barnes in form a conveyance of all the property and things by him purchased as aforesaid, being the railroad aforesaid from Milwaukee to La Crosse, with its rolling-stock, depot grounds, fixtures and appurtenances, and which corporation is now in the possession and enjoyment of said eastern division of said railroad.

52 But your orator further shows that he is informed and believes, and so charges the truth to be, that the said mortgage and supplement to said Barnes were fraudulently created by the said La Crosse & Milwaukee Railroad Company with the real intent of hindering and delaying and defrauding the creditors and stockholders of the said La Crosse & Milwaukee Railroad Company, and that the present corporators of the Milwaukee & Minnesota Railroad Company became such with the knowledge of such intent, and your orator insists that although the said the Milwaukee and Minnesota Railroad Company may exist in form and in fact as a corporation, that it holds the property so as aforesaid acquired by it through said mortgage and supplement in fraud of the rights of the lawful creditors of said La Crosse & Milwaukee Railroad Company.

Your orator further shows that the western division of said railroad from Portage City to La Crosse was subject to a mortage prior and paramount to your orator's said judgment, executed by the La Crosse & Milwaukee Railroad Company to Green C. Bronson, James T. Soutter, and Shepard Knapp, trustees, commonly known as the land-grant mortgage, which mortgage has been foreclosed in the district court of the United States for the district of Wisconsin, and said western division and its franchises sold thereunder, and the lien of your orator's judgment upon said western division thereby barred and foreclosed.

53 Your orator further shows that he is informed and believes, and so avers, that about the latter part of the year 1857, or during the early part of the year 1858, the said La Crosse and Milwaukee Railroad Company became insolvent and utterly worthless, and that it now has no property whatever either in possession or expectancy.

Your orator further shows that he is informed and believes that the said the La Crosse and Milwaukee Railroad Company has no place of business nor officers, and has ceased to act and exist as a corporation.

Your orator is further advised, and so charges the law and fact to be, that the judgment aforesaid constitutes a lien upon said eastern division of said railroad, and its appurtenances, property, and fixtures, and that he has no adequate remedy upon the said judgment at law, and can only obtain the fruit thereof by the interposition of this honorable court.

Your orator is informed and believes that said eastern division is encumbered by liens prior to your orator's judgment, as follows: A mortgage to Francis Palmer, trustee; two mortgages to the city of Milwau-

kee; a mortgage to Bronson and Soutter, known as the second eastern mortgage; a lease and judgment to Selah Chamberlain. That the said encumbrances amount to the sum of three and a half millions of dollars, or thereabouts.

Your orator further shows that he is informed and believes, and
54 so avers, that the said Milwaukee and Minnesota Railroad Company is utterly and wholly insolvent, and that it has created a mortgage upon the said eastern division for the aggregate sum of about six hundred thousand dollars, executed to Scribner and —— Funda, trustees, which is junior and subsequent to your orator's judgment lien aforesaid, and that the said the Milwaukee and Minnesota Railroad Company is diverting the revenues of the said eastern division to the payment of the principal and interest of said last mentioned mortgage, and that said the Milwaukee & Minnesota Railroad Company have neglected to pay and keep down interest on the said prior encumbrances, but fraudulently diverts the same as aforesaid, to the great injury of your orator.

Your orator is further informed and believes that on or about the twenty-second day of October, 1857, a writ of fieri facias issued out of the district court of the United States for the district of Wisconsin, upon your orator's said judgment, directed to the marshal of the district of Wisconsin, which, as therein commanded, he levied upon the said the La Crosse & Milwaukee Railroad, its depots, appurtenances and property, of which said marshal made return to said court, as by reference to the said writ and the proceedings thereon on file in this court will more fully appear, and which said levy your orator
55 is advised and avers, so far as the same had or could have legal force and effect, is still preserved and remains in full force unimpaired.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and that as fully and particularly as if the same were here repeated and the defendant specially interrogated thereto; and that the said judgment of your said orator may be decreed to be a lien upon the said eastern division of said railroad, together with all its property, depot grounds, fixtures and appurtenances; and that a receiver of the said eastern division of said railroad, together with all its property, depot grounds, fixtures and appurtenances, may be appointed, according to the course of practice of this court, and with the usual powers of receivers in like cases, and that he may be let into possession of the said railroad, with all its property, depot grounds, fixtures, and appurtenances; that he have power to operate said railroad; that the have power to apply the revenues thereof to the satisfaction of your orator's said judgment in the order of its priority, and that the said eastern division of said the La Crosse & Milwaukee Railroad may be decreed to be sold,
56 with its franchises, property, fixtures, and appurtenances, under the order and direction of this honorable court, subject to the above mentioned prior liens and encumbrances, to wit: 1, the mortgage to Francis Palmer, trustee; 2, the two mortgages to the city of Milwaukee; 3, the mortgage to Bronson & Soutter; 4, the lease and judgment to Selah Chamberlain; and that out of the proceeds thereof your orator may have satisfaction of his said judgment, and that your orator may have such further or such other relief in the premises as the

nature of his case shall require and as shall be agreeable to equity and good conscience—

May it also please your honor to grant unto your orator a writ of subpœna issued out of and under the seal of this honorable court, to be directed to the said Milwaukee & Minnesota Railroad Company, commanding it, at a certain day and under a certain penalty therein to be inserted, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience. And your orators will ever pray, &c.

JOHN W. CARY,
Compl'ts' Solicitor.
EMMONS & VAN DYKE,
Of Counsel.

57 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

Personally appeared before me, on this 18th day of April, A. D. 1866, N. A. Cowdrey, who, being by me duly sworn, did depose and say, that he is the agent of the above named complainant, who resides in the State of New York, and is not within this district to make this jurat.

That this affiant is equally familiar with the facts hereinbefore set forth as the complainant is; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the complainant, and as to those matters he believes it to be true.

JAMES MCFARLIN,
U. S. Com'r District of Wisconsin.

Subpœna was issued and returned with the endorsement thereon, April 29th, 1866, as follows:

"Served on the within named Milwaukee and Minnesota Railroad Company, by delivering personally to Ashbel Green, a director of said company, a copy of this subpœna, and by showing him this original subpœna, this 18th day of April, 1866."

MAY 26TH, 1866.

58 The Milwaukee and Minnesota Railroad Company, by its solicitor, Matt. H. Carpenter, appeared and filed an answer in said suit.

Said answer admitted the recovery of the judgment, the issue of the execution as alleged in the bill, and alleged that the defendant had no knowledge, information or belief as to what amount was due on the said judgment; denied the ownership of the said judgment by said Fred. F. James; alleged that it was really owned by the Milwaukee and St. Paul Railroad Co., and that Fred. P. James pretends to own the same for the purpose of upholding jurisdiction of this suit in this court, but that he is not the real owner of said judgment. Admits that at the time the judgment was rendered the La Crosse & Milwaukee Railroad Company owned the equity of redemption of the railroad from Milwaukee to La Crosse as stated in said bill of complaint, but denies that the judgment was ever a lien upon said railroad or any part thereof. The answer further sets up the Barnes mortgage, the sale under the Barnes mort-

gage, the organization of the Milwaukee and Minnesota Railroad Company, and that Barnes conveyed to said company all the property by him purchased as aforesaid, and that the Milwaukee and Minnesota Railroad Company immediately thereafter entered into the possession of the property and franchises of the La Crosse and Milwaukee Railroad Co., so far as the same were in the possession of the said La Crosse
59 and Milwaukee Railroad Co. at the time of said sale.

It avers that from and after May 21st, 1860, the Minnesota Company became the successors of the La Crosse Company; denies that the Barnes mortgage was fraudulently executed; admits that there was a mortgage on the western division of the road from La Crosse to Milwaukee, but denies that the same has ever been foreclosed, and alleges that the pretended sale of the said western division under said foreclosure decree mentioned in said bill of complaint has never been confirmed by any court having authority and jurisdiction to confirm the same; and that the Milwaukee and St. Paul Railroad Company, which pretends to own the same by virtue of said sale under said decree, unconfirmed by any court having jurisdiction to confirm the same, is a necessary and proper party defendant to said bill, and claims the benefit and advantage of said non-joinder. Denies that said judgment constitutes or ever did constitute a lien or encumbrance or charge upon the eastern division of said railroad or any part of the said railroad of said debtor company, or its property or fixtures, as stated in said bill of complaint. Admits that the eastern division is encumbered with liens as follows: A mortgage to Francis A. Palmer for securing bonds to the amount of $875,000.00;
60 two mortgages to the city of Milwaukee, to secure bonds to the amount of $314,000.00; a mortgage to Bronson & Soutter, known as the second eastern division mortgage, to secure bonds to the amount of $1,000,000.00; and a mortgage to Scribner & Fenda to secure bonds to the amount of $600,000.00, and alleges on information and belief that said eastern division is not subject to any other liens, encumbrances, or charges whatsoever, and denies that the said Milwaukee and Minnesota Railroad Company is insolvent. Denies the diverting of the revenues of the said eastern division or any part thereof.

It further alleges that for years prior to January last the said eastern division had been in the custody of a receiver of this court, appointed on a foreclosure suit in favor of James T. Soutter, survivor, to foreclose said mortgage given to said Bronson and Soutter, mentioned in said bill of complaint, and that the defendant was compelled to and did, in December last, pay over to the complainants in that suit over $467,000.00 to save said eastern division, its franchises, rolling stock, and fixtures from being sold under a decree of foreclosure and sale which had been rendered in that suit, and that but for such payment the premises would have been sold under said decree on the day the same was advertised for sale by the marshal under said decree; alleges that there is a fund now in court applicable to the payment of interest which has
61 fallen due on the said city mortgages and the Bronson & Soutter mortgage nearly or quite sufficient to pay the same, and that this court has made an order directing such application of the funds; alleges that by the orders and decree of sale in said suit it was made the duty of the receiver of the Milwaukee & St. Paul, on the payment of said sum, to deliver to the defendant the eastern division of the railroad and the rolling stock pertaining thereto, but that said complainant was one of the directors of said company, and ever since has been, but that he and the St. Paul Company, with intent to injure and oppress the defendant, refused to comply with such order and decree, and have,

ever since such payment was made, refused to deliver the rolling stock belonging to said eastern division, but that they now withhold and retain such to an amount exceeding in value the sum of five hundred thousand dollars, and that in consequence thereof the defendant has been unable to do the business and earn the money which otherwise it might. That when the defendant entered into possession of the road they were destitute of wood and other necessary supplies, which the defendant has been compelled to purchase for the necessary operation of said eastern division, and that not a cent of the earnings has been applied to the payment of any other thing except the legitimate
62 operation of the road. Denies that any proceedings have been had on said judgment to make it a lien on said eastern division, or on its rolling stock, fixtures or franchises, and avers that the same is not a lien, charge or encumbrance thereon, and that the same is owned by the defendant, free and clear of any charge, lien or encumbrance of said judgment; alleges that said James and others exhibit on the equity side of the court their bill of complaint against this defendant and others as defendants, in which James set up and alleged the same matters and things in regard to the character of said mortgages to the said Barnes which he sets up and alleges in the bill of complaint in this cause, and that issue was duly taken thereon by the answer of this defendant and replication of the said James, and that proofs were taken by said James and by this defendant upon said issue, and that such proceedings were thereupon had & that said cause came on to be and was heard on its merits, and thereupon the court dismissed the bill on its merits by decree made and enrolled. And this defendant will insist on the same as conclusive between the parties to this suit on that behalf.

It further alleges that before the rendition of the judgment in favor of Cleveland, to wit, on the 26th day of September, 1857, the La Crosse and Milwaukee Railroad was greatly embarrassed and in failing
63 circumstances; that to defraud its creditors it pretended to make and did make and deliver to Chamberlain a pretended deed or lease; that after the making and delivery ot said deed or lease Chamberlain entered into possession of the property.

Defendant alleges that to further defraud its creditors the company confessed a judgment on the 2nd day of October, 1857, in favor of said Chamberlain for the sum of $629,089.72 damages, and $15.50 costs, which was in form duly confessed, entered and docketed. Alleges that at the time said judgment was confessed the company was not indebted to Chamberlain the amount for which said judgment was rendered, and that there was no consideration whatever for the judgment, and that the judgment was confessed by said company in pursuance of said unlawful combination and confederacy between said company and said Chamberlain for the purpose of bolstering up said fraudulent deed or lease, and with the intent and design on the part of the company to thereby hinder, delay and defraud the creditors of said company.

It further sets up that after the confessing and docketing of said judgment in his favor said Cleveland recovered the said judgment mentioned in said bill of complaint, and that thereupon such proceedings were had that the said Cleveland caused to be issued on said judgment a writ of fieri facias, and levied upon certain real estate equitably belonging
64 to the La Crosse road, which real estate was not then used or needed by the company for any corporate purposes, and that the interest of said company therein was then worth more than the amount of said Cleveland judgment.

Alleges the purchase by Chamberlain of the Cleveland judgment, and that after such purchase Chamberlain remained in possession, under said pretended lease, and actually received from the net earnings of the railroad and other property so possessed by him, a sum larger in amount than what was then due, or now claimed to be due on said Cleveland judgment.

Alleges that while Chamberlain was in possession, under said pretended lease, and at a time when he held in his hands $50,000.00 in money which he ought to have paid over in satisfaction of the interest of said mortgage to said Bronson & Soutter, which fell due on the 1st day of September, A. D. 1859, and while he, Chamberlain, was the owner of the said Cleveland judgment, he fraudulently made default in paying the said interest, and by so doing permitted a suit to be commenced in equity to foreclose the last named mortgage, and that such suit was in fact commenced on the equity side of said district court, and that Chamberlain fraudulently and corruptly entered into a written agreement with the said Bronson and Soutter, by which he, said Chamberlain, bound himself to assist the said Bronson and Soutter
65 in foreclosing said mortgage, with a view to himself becoming the purchaser of said mortgaged premises, and that soon after the commencement of said foreclosure suit, he, Chamberlain, being still in possession under the said pretended lease, and having in his possession of said net revenues more than the amount then due on said last-mentioned mortgage applicable thereto, and having in addition thereto of said net revenues more than the amount then due on the Cleveland judgment, he, Chamberlain, voluntarily surrendered, said mortgaged premises, being the railroad from Milwaukee to Portage, together with the rolling stock, fixtures and franchises, to Bronson and Soutter as mortgagees, and that such proceedings were then had in said foreclosure suit, by the co-operation and assistance of the said Chamberlain, that a final decree of foreclosure and sale was rendered therein, and the said premises advertised for public sale at Milwaukee on the 4th day of January, 1866, and that this defendant was compelled to and did pay into court over $467,000.00; that but for said payment by this defendant, the said mortgaged premises would have been sold at public auction under said decree, and thus and thereby the lien of the said Cleveland judgment (if the same ever was or is a lien, which this defendant denies) would have been extinguished, and that the said
66 Chamberlain now holds, which he has not accounted for, net earnings received by him as aforesaid, and which he ought to have paid on the interest due on the last-named mortgage, more than $300,000.00, and this defendant is advised and claims that it is entitled to be subrogated to the place and priority of lien of the said Bronson & Soutter mortgage, to the amount so by it paid into court as aforesaid, and is entitled to hold and retain said premises until repaid said amount, as against the said Cleveland judgment; if this court shall be of the opinion that the said Cleveland judgment was and is a lien as aforesaid, still this defendant is entitled to be considered, and should be regarded and decreed to be a lien on said mortgaged premises to the amount so paid by this defendant prior to the lien of said judgment, and prior to all liens on said premises subsequent in date to the said mortgage last above named. Says that said Chamberlain remained the owner of said Cleveland judgment until shortly before the exhibiting the bill of complaint in this cause, when he pretended to assign the same; but this defendant is not informed and cannot state the precise time or date of said assignment.

Attached to the said answer as exhibits was the Barnes mortgage, the supplemental mortgage to Barnes, lease to Chamberlain, the
67 bill of Newcomb Cleveland against the La Crosse and Milwaukee Railroad Company, Byron Kilbourn, Moses Kneeland, James Ludington, and others.

June 4th, 1866, replication was filed to this answer.

July 2nd, 1866, complainant asked leave to file a supplemental bill. The supplemental bill is as follows:

Circuit court of the United States for the 9th circuit and district of Wisconsin.

FREDERICK P. JAMES
vs.
THE MILWAUKEE AND MINNESOTA Railroad Company.

To the judges of the circuit court of the United States for the district of Wisconsin:

Frederick P. James, of the city of New York, and a citizen of the State of New York, brings this his supplemental bill against the Milwaukee & Minnesota Railroad Company, a corporation created by the laws of the State of Wisconsin, and having its principal office of business in the city of Milwaukee, in said State of Wisconsin.

And, therefore, your orator complains and says that heretofore, to wit, on the 10th day of April, 1866, your orator exhibited his original bill of complaint in this honorable court against the said defend-
68 ant, Milwaukee & Minnesota Railroad Company, thereby stating, as therein is particularly stated and prayed, that a certain judgment therein described and belonging to your orator might be decreed to be a lien upon the said eastern division of said railroad, together with all its property, depot grounds, fixtures and appurtenances, and that a receiver of the said eastern division of said railroad, together with all its property, depot grounds, fixtures and appurtenances, might be appointed according to the course of practice of this court, and with the usual powers of receivers in like cases, and that he might be let into the possession of the said eastern division of said railroad, with all its property, depot grounds, fixtures and appurtenances.

That he have power to operate said railroad, to apply the revenue thereof to the satisfaction of your orator's said judgment in its order of priority, and that said eastern division of said La Crosse and Milwaukee Railroad might be decreed to be sold, with its franchises, property, fixtures, and appurtenances, under the order and direction of this honorable court, subject to certain prior liens and encumbrances therein mentioned, and that out of the proceeds thereof your orator might have satisfaction of his said judgment; and for general relief, as in and by the said bill of complaint, now remaining as of record in this
69 honorable court, reference being hereunto had, may and will appear.

And your orator further shows that said defendant was duly served with process of subpœna, and appeared to said bill.

And your orator further shows unto this honorable court, by way of supplement, that since his said bill was filed, to wit, on the first day of May, 1866, the sum of thirty-eight thousand dollars, for interest on the bonds issued under the mortgage of Francis A. Palmer, which is the first lien on said railroad, became due and payable, and the same

remains due and unpaid, and that no provision is made by said Milwaukee and Minnesota Railroad Company for the payment thereof.

Your orator further shows that on the 18th day of February, 1856, the said La Crosse and Milwaukee Railroad Company executed and delivered to Francis A. Palmer a supplemental mortgage on the said railroad and its appurtenances from Milwaukee to Portage City, in and by which said La Crosse & Milwaukee Railroad Company covenanted and agreed with said Francis A. Palmer that said company would annually, on or before the 1st day of November in each year thereafter, until the principal of two hundred thousand dollars in amount of
70 said bonds, issued under said Palmer mortgage, should be fully paid, set apart and appropriate from net earnings of the said road for the preceding twelve months, and deposit with the United States Trust Company of New York, as trustee for said bondholders, the just and full sum of twelve thousand dollars as a sinking fund, to retire and pay five hundred thousand dollars in amount of the principal of said bonds, and that the first payment should be made on the first day of November, 1856.

That no payments have been made, as provided in said mortgage, to said sinking fund since the first day of November, A. D. 1859, and that the sum of seventy-two thousand dollars is now due to said fund under said mortgage; that no steps have been taken by said Milwaukee and Minnesota Railroad Company to pay the same, or any part thereof, and the same remains wholly unpaid and unprovided for.

Your orator further shows that the sum of forty thousand dollars interest on the aforesaid mortgage given by the La Crosse & Milwaukee Railroad Company to Bronson and Soutter, and that eleven thousand dollars on the mortgages given by the last-named company to the city of Milwaukee will become due and payable on the first day of September next; and that, as your orator is informed and believes, no funds are provided for the payment thereof, and that said Milwaukee
71 and Minnesota Railroad Company do not intend to pay the same, but to suffer default thereon; that the said Milwaukee and Minnesota Railroad Company have been in possession of said railroad from Milwaukee to Portage City, and in receipt of its rents, tolls, incomes, and revenues, since the 9th day of January last, but that they have not paid any portion of the interest or principal of the encumbrances on said road; that they have not provided a sufficient supply of wood and other material for the operation of said road during the present season; and that they are suffering said railroad and its rolling-stock to go to waste and decay, and that the same are already greatly deteriorated under the management and control of said company.

Your orator further shows, on information and belief, that the Milwaukee and Minnesota Railroad Company have only a very small and insufficient force on said road to keep the same in repair; that said company is making no permanent repairs or improvement of the track or road-bed of said road, but only such temporary repairs as are absolutely required to enable them to operate the road for the time being; that all that part of said railroad from Horicon to Portage City is built with wooden culverts, which have now been in use for ten years,
72 and that in order to keep the said road in good condition and fit to operate, said culverts should be rebuilt and replaced, and that a large force of men are required for that purpose.

That but very few men are employed at the shops, and that no permanent repairs or improvements are being made to the rolling stock, but only such temporary repairs as are necessary to keep the same in

condition to be operated for the time being; and that said railroad and rolling stock has greatly depreciated in value for want of suitable and proper repairs since it has been in the possession of said company; and that if said interest is allowed to continue to accumulate, and said road and rolling stock to depreciate, that your orator's security for the payment of his said debt will become entirely worthless, and he will be unable to collect or save any portion of his aforesaid judgment; and your orator greatly fears that unless said interest so past due on said Palmer mortgage is paid, and the payment to said sinking fund made as provided in said supplemental mortgage, that foreclosure proceedings will be instituted on said mortgage, and a sale obtained thereon, whereby your orator will be deprived of all opportunity to collect his said judgment.

To the end, therefore, that the said defendant Milkaukee and Minnesota Railroad Company may answer all and every the matters
73 and things hereinbefore charged by way of supplement, and that your orator may have the same relief against the said Milwaukee and Minnesota Railroad Company as he might have had if the matters and things herein stated and charged by way of supplement had been contained in his said original bill of complaint; and that your orator may have such other and further relief in the premises as to your honors shall seem meet.

FREDERICK P. JAMES,
By JOHN W. CARY,
His Solicitor.

EMMONS & VAN DYKE,
Of Counsel.

DISTRICT OF WISCONSIN, *ss:*

Be it remembered that on the 27th day of June, A. D. 1866, personally appeared before me John W. Cary, and made oath that he is the solicitor for Frederick P. James, the complainant in the foregoing bill named; that the said bill of complaint is true to his own knowledge, except as to the matters therein stated to be upon the information and belief of said complainant, and as to those matters he believes it to be true.

JOHN W. CARY.

Subscribed & sworn to before me this 27th June, 1866.

J. M. MILLER,
U. S. Com'r Dist. Wis.

74 And on filing said supplemental bill, and on motion of complainant's counsel, ordered that the defendant plead, answer, or demur to the supplemental bill this day filed, on or before the first Monday of August, A. D. 1866, or the said supplemental bill may be taken as confessed against it.

JULY 10TH, 1866.

This day came complainant, by his counsel, and filed an amendment to his supplemental bill, as follows, to wit:

Circuit court of the United States for the 9th circuit and district of Wisconsin.

FREDERICK P. JAMES
vs.
MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

The complainant in the above entitled cause amends his supplemental bill filed herein:

1st. By inserting immediately before the prayer for general relief, as follows, to wit:

And that the said Milwaukee and Minnesota Railroad Company, its counsellors, attorneys, solicitors, officers, agents, and employees may be restrained by an injunction issuing out of this court from using, operating, or interfering with said railroad from Milwaukee to Portage City, its cars, locomotives, rolling stock, and other property, and from
75 collecting or receiving its revenues, tolls, and income.

2nd. By adding at the end of said supplemental bill as follows, to wit:

May it please your honors to grant unto your orator the people's writ of injunction issuing out of and under the seal of this court, directed to the said Milwaukee and Minnesota Railroad Company, their counsellors, attorneys, solicitors, agents, and employees commanding them and each of them absolutely to desist and refrain from using, operating, or in any manner interfering with said railroad from Milwaukee to Portage City, its cars, locomotives, rolling stock, and other property, and from collecting or receiving its revenues, tolls and income.

JOHN W. CARY,
Complainant's Solicitor.

EMMONS & VAN DYKE,
Of Counsel.

SEPTEMBER 1ST, 1866.

The Milwaukee and Minnesota Railroad Company filed its answer to amended supplemental bill, and in its answer admits that interest will mature, as alleged in the bill, on the mortgage given to Bronson & Soutter, and the mortgage given to the City of Milwaukee, but says that it is not true, and it denies that said company does not intend to pay the same, but suffer default therein; but, on the contrary thereof,
76 says it is its intention and purpose to pay the same, and all the same.

Admits that since it has been in possession of the said eastern division, to wit, since the 20th day of January, 1866, an unusual amount of disbursement has been necessary to put the road and rolling stock received by the company into good repair and running order, in consequence of the manner in which the same had been managed by the Milwaukee and St. Paul Railway Company, during the time it had possession thereof, and that for that reason the Milwaukee and Minnesota Railroad Company has not been able from the earnings of the road to pay any portion of said interest maturing on the said Palmer mortgage; alleges that the earnings are kept in the Merchants' National Bank of Milwaukee within the jurisdiction of the court; that the road is well provided with an ample supply of wood and other materials for its operation during the season; that the company is not suffering the road or its rolling stock to go to waste and decay; that the road and rolling

stock are not at all deteriorated in value, but that the same is in better condition and repair than when received; alleges that it has an adequate and sufficient force employed to keep the road in good repair, and the same is so kept; that it has not been out of running order one
77 day since it had possession; that it is making all the repairs necessary to keep the same in running order and from going to waste; that it has and intends to save of the net earnings every cent not needed for such repairs to apply to the payment of interest matured and hereafter to mature on the encumbrances on the property; says that all the men are employed that are needed for an economical management of the road, and to keep the rolling stock in good repair; that it does not intend to make useless and unnecessary improvements for the purpose of squandering the funds arising from the operation of the road, but on the contrary thereof, understands its duty to be to keep the road and stock in good repair and save, to be applied on the encumbrances upon said property, as much as possible of the earnings of said road; alleges that it believes that the earnings of said road will be equal or nearly equal to the payment of interest matured and hereafter to mature upon the encumbrances on the same; that the same will be so faithfully applied by the company, and if the said interest shall not be paid it will be because the earnings of the road are not sufficient for that purpose, and it is not in the power of the company in any other manner to raise funds to pay the same. Alleges that no foreclosure proceedings upon any of the mortgages which are encumbrances upon said
78 property will be had if it is within the possible power of the company to prevent the same.

SEPTEMBER 3RD, 1866.

Three months allowed under the rule for taking testimony in this case having expired, on the motion of John W. Cary, complainants' solicitor, ordered that the proofs in this cause be and the same hereby are closed. And further ordered that the cause be set down for hearing at the next term of this court, to be held on the second Monday of September, A. D. 1866, on pleadings and proofs and that the supplemental complaint and amendment thereto be set down for hearing at the same time on bill and answer.

SEPTEMBER 19TH, 1866.

Finches, Lynde & Miller filed a motion that they be substituted as solicitors and counsel of record for the Milwaukee and Minnesota Railroad Company.

OCTOBER 3RD, 1866.

Time for taking testimony extended until the 1st day of January, 1867.

JANUARY 8TH, 1867.

This day came the parties by their counsel and by stipulation this cause is submitted to the court on the pleadings and proofs with the privilege of the parties to be heard in the city of Milwaukee before the judge at his chambers on a notice of one day by either party to the other, and that the decree of this court in this cause may be entered at any time as of any day of this term, and saving to either party
79 every right of objection that could be taken to a hearing at this time or to the proofs on a hearing at this time.

On the 5th day of said term, to wit, on the 11th day of January, 1867, the following proceedings were had, to wit:

Circuit court of the United States for the district of Wisconsin. In equity.

FREDERICK P. JAMES
vs.
MILWAUKEE & MINNESOTA RAILROAD COMPANY.

This day this cause came on to be finally heard by consent and in pursuance of an agreement of parties upon pleadings and proofs, and was argued by counsel; and it appearing to the court that Newcomb Cleveland on the 7th day of October, A. D. 1857, by the consideration and judgment of the district court of the United States for the district of Wisconsin, recovered against the La Crosse and Milwaukee Railroad Company the sum of one hundred and eleven thousand seven hundred and twenty-seven dollars and seventy-one cents damages, together with five hundred and forty-four dollars and fifteen cents costs, which said judgment was docketed on the same day so as to become a lien and be a charge upon the lands, tenements, real estate, chattels real, and also the railroad and appurtenances hereinafter described of the said
80 La Crosse & Milwaukee Railroad Company in this district, and that there is now actually due and unpaid on said judgment after deducting partial payments the sum of ninety-eight thousand eight hundred and one dollars and fifty-one cents.

And it further appearing that said La Crosse & Milwaukee Railroad Company has ceased to exist as a corporation, and that the defendant, the Milwaukee and Minnesota Railroad Company, has succeeded to its property, rights, and franchises, subject to the liens, charges, and encumbrances thereon. That said liens, charges, and encumbrances which are prior in date to the docketing of the aforesaid judgment, are as follows, to wit: a mortgage to Francis A. Palmer, trustee, for nine hundred and fifty thousand dollars, with interest at eight per cent., unpaid since the first day of May, A. D. 1866; two mortgages to the city of Milwaukee, together amounting to three hundred and fourteen thousand dollars, with interest at seven per cent. from the first day of September, 1866; a mortgage to Green C. Bronson and James T. Soutter for one million of dollars, with interest at eight per cent. since the first day of March, 1866, and a judgment rendered in favor of Selah Chamberlain against said La Crosse & Milwaukee Railroad Company on the second day of October, 1857, for six hundred and twenty-nine thousand and one hundred five dollars and twenty-two cents, and a
81 lease to said Chamberlain to secure the same. And it further appearing that all the railroad of the said La Crosse & Milwaukee Railroad Company and other property, excepting ninety-five miles of railroad from Milwaukee to Portage City, with the rolling stock and appurtenances thereto belonging, have been sold on liens and claims prior and superior to the docketing of the aforesaid judgment in favor of said Newcomb Cleveland, and that said judgment so recovered by said Cleveland has been assigned and is now owned by said complainant.

And thereupon, on consideration thereof, it is ordered, adjudged, and decreed by the court that there is due the complainant on said judgment so recovered by said Newcomb Cleveland the sum of ninety-eight thou-

sand eight hundred and one dollars and fifty-one cents, and that the same is a lien, charge, and encumbrance as of the date of October seventh, A. D. 1857, upon all the right, title, and interest which the said La Crosse and Milwaukee Railroad Company had of, in, and to the said La Crosse & Milwaukee Railroad, its rolling stock, franchises, and appurtenances, from Milwaukee to Portage City aforesaid.

And it is further ordered, adjudged, and decreed by the court that all and singular the railroad formerly known as the La Crosse and Milwaukee Railroad from Milwaukee to Portage City, its depots, station-houses and buildings, together with all its rolling stock, franchises, and
82 appurtenances now in the possession of or claimed by the defendant, the Milwaukee & Minnesota Railroad Company, be sold at public auction by the marshal of this district, unless prior to such sale said defendant pay to said complainant, or his solicitor, or to said marshal, the amount so as aforesaid adjudged due said complainant, with interest and costs up to the time of such payment.

That said sale be made at the post-office in the city of Milwaukee on the second day of March next, at two o'clock in the afternoon of said day; that said marshal give public notice of the time and place of such sale by publishing the same four weeks in some daily newspaper published in the city of Milwaukee. And that the complainant or any of the parties in this cause may become the purchaser, and that said sale be made subject to the aforesaid liens, claims, charges, and encumbrances of the said Francis A. Palmer, the city of Milwaukee, Green C. Bronson, and James T. Soutter, and the said judgment and lease so as aforesaid in favor of Selah Chamberlain for the several amounts due or owing on said claims respectively, with interest as aforesaid; and that the said marshal, after the confirmation of said sale by the court, execute a deed or deed' to the purchaser or purchasers of the premises; and that the said marshal, out of the proceeds of said sale, retain his fees, dis-
83 bursements and commissions on said sale, and pay to the complainant or his solicitor out of said proceeds his costs in this suit to be taxed, and also the amount so found due the complainant as aforesaid, together with the interest thereon from the date of this decree, or so much thereof as the purchase money of the premises will pay on the same, and that the marshal take receipts for the amount so paid and file the same with his report, and that he bring the surplus moneys arising from said sale, if any there be, into the court without delay, to abide the further order of the court.

And it is further ordered, adjudged, and decreed that the defendant, the Milwaukee and Minnesota Railroad Company, and all persons claiming or to claim from or under said defendant, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said railroad, rolling stock, franchises, and appurtenances and every part and parcel thereof.

And it is further ordered, adjudged, and decreed by the court that the purchaser or purchasers of said premises at such sale be let into possession thereof, and that any of the parties to this cause who may be in possession of said premises or any part thereof, and any person who since the commencement of this suit has come into possession under said defendant, deliver possession thereof to such purchaser or
84 purchasers on production of the marshal's deed for such premises, and a certified copy of the order confirming the report of such sale.

A. G. MILLER.

FEBRUARY 23RD, 1867.

A. Finch presented a petition on behalf of the defendant praying an order to stay the sale of the said road and appurtenances, which said petition is in the words and figures following, to wit:

Circuit court of the United States for the district of Wisconsin.

F. P. JAMES
vs.
MILWAUKEE & MINNESOTA RAILROAD COMPANY.

To the Hon. A. G. Miller, judge of the circuit court of the United States in and for the district of Wisconsin:

The Milwaukee and Minnesota Railroad Company, your petitioner, respectfully represents that it was recently informed that the above-entitled cause, at the January term lately held at Madison in said district, was submitted by the solicitor for complainant, and Mat. H. Carpenter, solicitor for your petitioner, upon the stipulation that the same might be argued by said Carpenter for and on behalf of your petitioners before your honors at chambers.

Your petitioners further represent that they are informed that
85 on the 26th day of January last, that the solicitor for complainant called up said case before your honor, having notified said Carpenter thereof, who appeared before your honor and waived the argument which he had herotofore by stipulation reserved the right to make, and that thereupon your honors entered in said cause an order of sale of your petitioner's road and property described in said complainant's bill of complaint, and that under and by virtue of said order or decree, the said road and property is advertised by the marshal of the said district to be sold on the 2nd day of March next.

Your petitioners further represent that Mat. H. Carpenter had been their attorney and solicitor generally for several years previous to the time of entering the decree aforesaid, and that on that day they were informed that said Carpenter had abandoned said suit and retired from it as solicitor for your petitioners, leaving them unrepresented in the case, and the decree to pass without an argument upon the merits thereof.

Your petitioners further represent to your honor that they are advised by counsel, and verily believe, that the judgment mentioned and set forth in said bill of complaint is not a lien upon their road and property, and that by reason thereof they have a good and valid defence upon the merits to said bill of complaint.

Your petitioners therefore pray that your honor will grant an
86 order to stay sale, so as aforesaid advertised to be made, and also to open or vacate said order or decree, and allow your petitioners to appear by their solicitors and be heard upon the merits of said bill of complaint and the proofs therein; and they will ever pray, &c.

MILWAUKEE & MINNESOTA RAILROAD COMPANY,
By JOHN P. GREEN, *Treas.*

FINCHES, LYNDE & MILLER,
Def'i's Solicitors.

DISTRICT OF WISCONSIN, *ss:*

Jno. P. Green, of Milwaukee, in said district, being first duly sworn, says that he is the treasurer of the Milwaukee and Minnesota Railroad

Company, the within petitioner; that he has heard read and subscribed the within petition, subscribing the same as treasurer of said corporation for said corporation, and that deponent knows the contents of the said petition, and that the same is true to deponent's knowledge.

JNO. P. GREEN.

Sworn to and subscribed before me this 21 Feb'y, 1867.

FRANCIS BLOODGOOD,
U. S. Com'r.

And on hearing said counsel in behalf of said petition, and Mr. Cary in opposition thereto, it is ordered by the district judge that the prayer of said petition be not granted.

That such proceedings were afterwards had that the said property mentioned in said decree was authorized for sale, and sold by the United States marshal.

87 His report of sale is in the words and figures following, to wit:

In the circuit court of the United States for the district of Wisconsin.
In chancery.

FREDERICK P. JAMES
vs.
MILWAUKEE AND MINNESOTA RAILROAD COMPANY.

I, Cassius Fairchild, marshal for the district of Wisconsin, hereby report, that in pursuance and by virtue of a decree made by the circuit court of the United States for the district of Wisconsin, on the eleventh day of January, A. D. 1867, as directed in said decree, I gave notice of the time and place of sale by publication once each day from January 26th to March 2nd, 1867—Sundays and holidays excepted—in the Milwaukee News, a newspaper published in the county of Milwaukee (a printed copy of said notice and the affidavit of publication are hereto annexed and referred to as part of this report); and I did at the time and place mentioned in said printed notice, to wit, on the second day of March, 1867, at two o'clock p. m., at the post-office in the city of Milwaukee, then and there sell at public auction the premises described in said decree, as follows, to wit:

88 All and singular the railroad formerly known as the La Crosse and Milwaukee Railroad, from Milwaukee to Portage City, its depots, station houses and buildings, together with all its rolling stock, franchises and appurtenances, now in possession of or claimed by the defendant, the Milwaukee and Minnesota Railroad Company, including all the locomotive engines, cars and rolling stock, and all the materials, tools, implements and utensils, and other property belonging to said road from Milwaukee to Portage city; subject, however, to the following liens and encumbrances thereon, to wit, a mortgage to Francis A. Palmer for $950,000.00, with interest thereon at eight per cent. per annum, since May 1st, 1866; two mortgages to the city of Milwaukee for $314,000.00, with interest thereon from the 1st day of September, 1866; a mortgage to Green C. Bronson and James T. Soutter for $1,000,000.00, with interest at 8 per cent. per annum from March 1st, 1866; and a judgment rendered in favor of Selah Chamberlain in the district court of the United States for the district of Wisconsin, on the 2nd day of October, 1857, for $629,105.22; and a certain lease given to said Chamberlain as security for the amount of said judgment in the State of Wisconsin, which was bid off by the Milwaukee and St. Paul Railway Com-

pany for the sum of one hundred thousand nine hundred twenty
89 and $\frac{94}{100}$ dollars ($100,920.94), it being the highest and best bidder, and that being the highest and best bid made for the premises described.

And I further report that the total amount of proceeds of said sale, $100,920.94, is sufficient to pay the principal, interest and costs taxed, together with costs of sale due on said decree, as will more fully appear from the annexed statement made a part of this report.

CASSIUS FAIRCHILD,
U. S. Marshal.

Statement referred to in the foregoing report.

Amount of decree		$98,801 51
Interest from January 11th, 1867, to March 2nd, 1867, at 7 per cent		979 74
Total costs		107 76
Costs of sale, printer	$31 93	
Marshal's fees	1,000 00	
		1,031 93
Total amount of decree, interest & costs		100,920 94
Total proceeds of sale		100,920 94

Which said report of sale was confirmed by the court, and thereupon the said marshal, by the direction of the court, executed a deed to the purchaser, the Milwaukee & St. Paul Railroad Company, of the premises mentioned and described in said decree.

And to the reading of which said record, and the proceedings in said suit, and the said decree and the said report of sale, and the confirmation thereof, and the said marshal's deed, the said plaintiff by his
90 said counsel, did then and there object, for the reason that said suit was commenced on the 18th day of April, 1866, long after the recording of the sheriff's deed to Charles Howard, which deed was recorded on the 20th day of November, 1863, at 1.30 o'clock p. m. That said suit is against the Milwaukee and Minnesota Railroad Company only, and not against the La Crosse and Milwaukee Railroad Company, and is a suit in which no other party is named as defendant except the Milwaukee and Minnesota Railroad Company, and as against this plaintiff the said record should not and cannot be used to wipe out the egal title which the plaintiff acquired under his deed recorded November 20th, 1863.

Which objection was then and there overruled, and the said record and marshal's deed read in evidence, and to which said ruling and decision said plaintiff by his said counsel did then and there except.

Said defendant further offered in evidence for the purpose of showing that the La Crosse Company ceased to exist as a corporation from and after the 14th day of February, 1859, the book of records of the directors of said company, showing when the last meeting of said company was held; which appeared from said records to have been on the said 14th day of February, 1859, and no minutes of any subsequent meeting were recorded therein.

91 Said counsel in connection with said offer of said record stated as follows, and which by agreement was received as evidence:

"One the 11th day of June, 1860, Hans Crocker, in pursuance of

orders of this court, took possession of the La Crosse & Milwaukee Railroad as receiver, with all of said company's offices, books and papers. I was the counsel who procured his appointment, or one of them. From that time to the present I have been engaged in the business of the receiver, and the parties who ultimately became the owners of the road, all except the Milwaukee and Minnesota R. R. Co. During that time I have had the principal charge of the books of the La Crosse Co. that were taken possession of, had the oversight of them. This was the book of minutes, or the last volume of the book of minutes that came into the hands of Hans Crocker at that time, and from him passed to the St. Paul Company, and has been in the possession of the St. Paul Co., and chiefly under my superintendence ever since. For the last sixteen years I have been intimately connected with the officers of this company, and with the litigation in regard to it, and so far as I know, there have been no officers, directors or company in existence, or exercising any functions since about that time, and no further records have ever come to my knowledge. I believe there are none later than this book. During all that time I have resided for the last sixteen
92 years in the city of Milwaukee."

To which record and to the said statement of the counsel, the said plaintiff by his said counsel did then and there object, as irrelevant and immaterial and incompetent. Which objection was then and there overruled, and the said record and the said testimony of the counsel allowed, to which said ruling and decision said plaintiff by said counsel did then and there except.

Said defendant further offered in evidence the record of a suit in the circuit court of the United States for the district of Wisconsin, commencing on the 9th day of December, 1859, by Bronson and Soutter, to foreclose the mortgage heretofore referred to as the Bronson and Soutter mortgage, and from which it appeared that Sebre Howard was a party defendant in said suit, and the present complainant, Charles Howard, appeared in the litigation; and afterwards, that such proceedings were had in said action, that the following order was made.

And on the same day came the Milwaukee and Minnesota Railroad Company by Matt. H. Carpenter, its solicitor, and on his motion and on the mandate of the Supreme Court of the United States in this cause, ordered that the whole amount due the complainants in this cause, and to become due before the day of sale of the mortgaged premises,
93 are estimated, as now appears to be, as follows, viz: amount fixed by order or decree nisi, $405,290.05, together with interest thereon since September 27, 1864; coupons due March 1, 1865, $40,000, with interest thereon since that date; coupon to become due September 1st, 1865, $40,000, with interest, $35,769.33, with interest thereon from this day.

Ordered further, that in case said Milwaukee and Minnesota Railroad Company shall before the sale of the mortgaged premises in this cause pay to the clerk of this court for the complainant in this cause the several sums above mentioned, with interest thereon as aforesaid, to the day of such payment, and the costs in this cause to be taxed, that upon such payment the said receiver, Hans Crocker, and the said Milwaukee and St. Paul Railroad Company, its officers, directors, agents and employees, deliver over to said Milwaukee and Minnesota Railroad Company, the eastern division so-called, of the LaCrosse & Milwaukee Railroad, so-called, from Milwaukee to Portage, together with all the rolling stock that was on the whole of the La Crosse and Milwaukee Railroad, or belonged or appertained thereto, when the said receiver was

appointed, except forty box cars, numbered as follows, viz: 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 362, 364, 366, 368, 370, 372, 374, 376, 378, 380, 382, 384, 386, 388, 390,
94 392, 394, 396, 398, 400, 402, 404, 406, 408; and also deliver to said Milwaukee and Minnesota Railroad Company such proportion of the rolling stock that was purchased by the receiver as 121,178 dollars bears to 46,199 dollars, together with all the rights, privileges and franchises, and personal and other property, belonging or in any wise appertaining to said railroad from Milwaukee to Portage, and that said receiver be thereafter dismissed and discharged, except for the purpose of passing his accounts.

Ordered further, that before the Milwaukee and Minnesota Railroad Company shall be allowed and permitted to enter into possession as aforesaid, it shall make, execute and file with the clerk of this court a bond to the United States in the penal sum of twenty-five thousand dollars, with sufficient surety, to pay Sebre Howard and Selah Chamberlain, or the owners of said judgments or either of them, all such sums as may come into the hands of said company, which shall hereafter be found to be rightly applicable to the payment of their claims, if they shall be established as liens upon said road; and that said company execute its bond to Hans Crocker in the sum of twenty thousand dollars with sufficient surety, to indemnify him for contingent liability mentioned in the report of the auditor in this cause.

Ordered further, that said Howard or Chamberlain may at any
95 time hereafter apply to the court for an additional bond, if the circumstances of the case shall require it; both of said bonds hereinbefore mentioned to be approved by the clerk of this court.

Ordered further, that if the said Milwaukee and St. Paul Railway Company shall pay over the sum in its hands, or any part thereof, as this day ordered, the said Milwaukee and Minnesota Railroad Company shall only be required to pay to the clerk of this court the balance of the amount so due said complainant at the date of payment by said last named company, over such sum so paid by said Milwaukee & St. Paul Railway Company, and said Milwaukee and Minnesota Railroad Company shall be entitled to possession as hereinbefore mentioned, upon payment of such balance, and giving bonds as hereinbefore ordered.

It appeared from said record that Charles Howard appeared by his attorney, Judge Levi Hubbell, in said foreclosure suit; that he assigned to the defendant his interest in the judgment which he had recovered in the United States court somewhere about the 28th of November, 1863.

Counsel further stated that in pursuance of that decree, the Milwaukee and Minnesota Railroad Company paid into court $468,000.00, within the time fixed by the order, and gave the bond required by that order.

This payment was made January 4th, 1866, and the property and
96 railroad was surrendered to them from Milwaukee to Portage, with all its appurtenances, on the 20th day of January, 1866.

Defendant's counsel further states that the Milwaukee and Minnesota Company remained in exclusive possession of that property from Milwaukee to Portage, from that time until the 6th day of March, 1867. On that day I presented to the superintendent in charge a certified copy of an order confirming the sale in the James case on the Cleveland judgment with a copy of the marshal's deed, and demanded possession of the road for the Milwaukee and St. Paul Railroad Company, in virtue of the purchase under that decree and judgment. In compliance with that demand, it was surrendered to the Milwaukee and St. Paul Company,

and since that time they have been in possession and operation of it, claiming it as owned by them.

To the reading of which said proceedings in said suit, and the order thereon, and the testimony or statement of the counsel in connection therewith, the said plaintiff by his said counsel did then and there object on the ground that the same was irrelevant, incompetent and immaterial; and the said record was read and the testimony of counsel allowed to stand as evidence in the case, and to which said ruling and decision
97 said plaintiff by his said counsel did then and there except.

And the said defendant, to further maintain the issue on his part, offered in evidence the testimony of William R. Sill, who testified: That he was formerly connected with the La Crosse R. R. Co., as its chief engineer. That he was not with the company in 1856 and 1857. In 1858 and 1859, he was engaged most of the time. From 1853 to 1856, was on the line of the road as chief engineer; from 1858 to 1860, as civil engineer, and from 1860 to 1866, as chief engineer. That he was acquainted with the line of the road and its location from the round-house in the city of Milwaukee to the depot in said city. That he superintended the entire construction of the first part of the work, which was done from 1853 to 1856. That he had been partly over the ground within the past twenty-four hours; that he is acquainted with the grounds from the passenger depot up to the round-house. That he recognized, by looking at the map shown to him, the lands marked red, and lying west of the canal, as the lands that belonged or were in the possession of the road. That he has been engaged in railroading for twenty-five years or more. That he understands the necessities of a road in regard to what land they need. That the grounds of the railroad in 1859 were substantially as marked on the map. That the grounds in Milwaukee
98 are substantially the same as they are marked on the map.

The road was constructed to La Crosse in 1859. There was a branch coming in at Horicon. Of course its plan and design was to do all the business in that section of the country. It had no other depot at that time, or depot grounds in Milwaukee, than those exhibited on the map shown him, marked red. There is a railroad located and built over the grounds marked in red, on the west side of the canal. The grounds at the upper end of this map are where the machine shops are located. On the first block there are out-houses and woodsheds. The railroad was partially constructed in 1853. It was completed, and a track laid over it in 1854, the main track. It has been used and operated as a railroad from that time to the present, and is now. The line of the railroad passes over the ground in lot 83, as it is marked in red on the map. The northwest line of that ground is simply a right of way line, as I recollect it, and it is some fifty or sixty feet from the center of the track. Down towards the canal in 1859, 1860, & 1861, and up to 1866, it was occupied by woodsheds, quite extensive woodsheds, for the use of the road. Across lots 84, 85 & 86, the track is considerably elevated above the surface of the canal. Quite a portion of that was taken out for the slope. It is my impression there were some side tracks in there. I would not be positive.

99 There was no ground there, except what was used for the railroad tracks, and it was necessary for the tracks. There was no vacant room in lot 88; it was occupied either by the road-bed or upper slope. There is a heavy slope northwest of that, and there was a slope running into the canal and an up-slope into the hill. I do not understand that there was any part of the lots situated in block 33 of Sherman's addition which were used for anything but the right of way

That part of lot 1, where it crosses Sherman street, block 43, was not used at that time, except that gravel had been taken out of there, and side tracks were put in there in 1858. Up to 1864, they were constantly adding side tracks. I think the slope between the canal and the grade would take considerable of that lot. Lots 1 and 4, block 47, in Sherman's addition, there is nothing there but the right of way. That is known as the reserved acre. A portion of it was twenty years ago a high knoll covered with gravel, and dwelling houses on it. When the road ran there the right of way was taken out of it, and the part lying between the railroad and canal was stripped entirely of its gravel, down to the hard-pan. Subsequent to that, about 1858 or 1859, there were one or two side tracks put in there, and it was used for storing cars.

Portions of lots 1, 2, 4 & 6, in block 47, were used for right of way,
100 and the balance lies between the road and the canal, and is used as a side track. Lots 1 & 4, parts of lots 6, 7, & 8, in block 13, were used as a right of way. There is a triangular piece in each one of these lots. I do not know exactly how much; perhaps sixty feet on the line, covering 1,600 or 1,800 feet; 2,000 square feet. That I do not know has ever been used for railroad purposes. That comes, of course, from the road running diagonally.

There is a small corner of these lots that I don't know was ever used. I have an impression and my recollection is that at times I have seen those lots partly filled with fence posts and telegraph poles. Lots 1 and 4, in block 41, stand to-day in about the same light as if fragments or pieces of land in block 13; lots 6, 7, and 8, in block 21, had a large warehouse on it in 1867. The warehouse was put up in 1861 by the railroad company and owned by them. Block 30, in 1867 was occupied; there was on it two warehouses and a blacksmith's shop. There were several side tracks. My best recollection would be that the warehouses were 400 or 500 feet along the line, over towards Third street; there was also a blacksmith's shop, a car-smith's shop. The whole of that block marked in red was occupied by the tracks and buildings of the railroad in 1867; none of it could be dispensed with with advantage. That part of block 33 colored red had a warehouse upon it—there were some

clerks' offices in the building—covering the whole of the block.
101 There is now an engine-house on that lot. There was a warehouse begun right back of the engine house, and it ran, I should say, about 400 or 500 feet alongside, parallel with the track. It was longer at the south end of it, and occupied as clerks' offices. Two or three tracks crossed that part of block 40, except lot 1, which is not colored on the map; it is occupied by warehouses. Block 41 was occupied by an elevator, and passenger trains were made up there. I think it was substantially used by the elevator business and receiving and shipping iron. A good many goods that came from lake vessels were landed and received there; it was used for shipping wheat, &c. From 1858 to 1867, the whole of that block, save two stores that Mr. Mariner had possession of, were occupied and used by the railroad company in its business. That part of block 40 between the railroad and Third street was needed by the railroad. The railroad had never completed its buildings and they were in an unfinished state up to 1867.

And thereupon the said counsel for said defendant propounded to the said witness the following question: Was it at the time deemed necessary to have the whole of that block 40 for the purposes of the railroad, by the railroad company, and was the whole of it procured, except part

of lot 1, for the purposes and uses of the railroad, by the railroad
102 company?

To which said question said counsel for the plaintiff did then and there object, for the reason that the same was irrelevant, immaterial and incompetent, and as calling for the opinion of the witness, which objection was overruled and the question allowed, and to which ruling the plaintiff by his said counsel did then and there except.

And the witness answered: At the time this road was being constructed, it was certainly so deemed; at the time this block 40 was purchased, it was purchased for that purpose.

And thereupon said counsel propounded to said witness the following question: Was the whole of block 40, except that part of lot 1 not colored, necessary for the uses and purposes of this railroad?

To which said question said plaintiff, by his said counsel, did then and there object, for the reason that the same was irrelevant, incompetent and immaterial, and was an attempt to prove by parole the title to real estate described in the decree under which the defendant claims its title. The objection was overruled and the question was allowed, and to which said ruling and decision said counsel for said plaintiff did then and there except, and the witness answered the said question, that it was necessary.

103 And thereupon said defendant by his counsel propounded to the said witness the following question: Block thirty-three, the lots in that block—state whether they were necessary.

To which said question said plaintiff by his said counsel did then and there object, for the reason that the same was irrelevant and immaterial, and because it was an attempt to prove by parole the title to said real estate, which objection was then and there overruled and said question allowed, and to which said ruling said plaintiff by his said counsel did then and there except.

And the witness answered: Block 33 was substantially covered with buildings, a good many years occupied by clerks' offices and freight warehouse. It was necessary to the use of the railroad. The same as to block 30. I don't know how they could operate the railroad without it. There were two warehouses on it. I would not like to say they occupied every inch, but there were two warehouses and a car-shop on it; it was what you may call thoroughly used. Lots 6, 7, & 8, block 21, was occupied by a warehouse, put up there in 1861, shaped like the land it is on.

Question propounded by the counsel for the defendant to the witness: Lots 1 and 4, block 21—what do you say in regard to the necessity of the company owning those?

104 Which said question was objected to by counsel for the plaintiff, as irrelevant, incompetent and immaterial. Said objection was overruled, the question allowed, and to which ruling said plaintiff, by his said counsel, did then and there except.

And the witness answered: Used simply as a right of way. That is, one of those triangular pieces in a corner, they were never able to use very thoroughly. I believe I stated I had seen telegraph poles on it. It is necessary for every railroad to have places where they can store such property. These places are suitable for that purpose.

Same question, and the same ruling, and the same exception as to block 13; and the witness answered: The track extends across the whole length of it.

Same question, same objection, same ruling, and the same exception as to block 47. The witness answered: That is the reserved acre. It is not only covered with a main track, but side tracks. There is a small

portion of the hard-pan that has not been brought down to the grade; nevertheless it is all in use.

Thereupon the said defendant's counsel propounded to said witness the following question: In your opinion as a railroad man, is there any part of that land owned by the railroad company, which is colored there upon that map red, that the railroad could have dispensed with
105 with due regard to its own business interests?

Which question was objected to as irrelevant, immaterial, and incompetent, and as calling for the opinion of the witness. Objection overruled, question allowed, and to which ruling said plaintiff by his said counsel did then and there except.

And the witness answered: No, sir; I do not think they could have dispensed with any of it.

Cross-examination:

I am not in the employ of the company to-day. I left its employ in the fall of 1866. I was not engaged upon the road generally in any capacity in the year 1867. I do not know of my own knowledge what property the Milwaukee and Minnesota Railroad took possession of.

Witness is here shown map exhibited by counsel for the plaintiff, and says that the map substantially represents block 41, with the tracks on it.

I think the company had an elevator and was shipping a good deal of iron ore, and landing the same on the west side of the railroad tracks. Of lots 8, 9, and 10, in block 41, I cannot say it was ever used by the Milwaukee and Minnesota Railroad Company. Lots 8, 9, & 10, in block 41, were used by the railroad company for a number of years. It used to be a standing spot for omnibusses that came in there. I
106 don't know whether they were used at all by the Milwaukee and Minnesota Railroad Company. There is a brick house as marked on the map, 20 by 52. I had my office in it two years, in 1854 and 1855. After that it was used as the general offices of the company; I should say up to 1857. After that it was used as a residence of one of the employees about the depot—I have forgotten just what capacity he was in—used and occupied by him as a dwelling house. The next, marked "Frame building, 20 by 52, used by William Stern as a saloon, formerly occupied as a harness shop," I don't recollect anything about. There were some frame buildings in there in 1854. I don't know whether the railroad company ever used them.

The defendant's counsel disclaimed any right, title, or interest in that property, saying that the railroad company is not in possession of it, and never has been.

Lot 6, block 41, described on the map as follows: "Occupied by the officers of the Northern Division of the St. Paul Railroad until 1871, then by the Milwaukee & Northern. It was afterwards used as a school and temperance hall." I know nothing of it subsequent to 1867; it was used for railroad purposes subsequent to 1858 for the general offices and passenger station.

The next describes a three-story brick buiding, 62 by 45, used as offices for railway employees. La Crosse & Milwaukee Railroad
107 Company is all one building, and stood there in 1858. Lot 5, block 51, I do not recollect what use was made of it.

Defendant's counsel says: We never have been in possession of it. Mr. Mariner is there in opposition to us, claiming his rights as owner.

Witness says: I have no recollection of the railroad company having made any use of it. Cannot say whether the railroad company ever

occupied the next lot, 5, "paint-shop, occupied by P. Smith." Lots 4, 3, 2, & 1, marked as vacant lots, they were used by the railroad company as long as the La Crosse & Milwaukee Company operated the road. Baggage wagons came in there; express wagons and mail wagons also came in there. The blue line represents the Milwaukee River, and the elevator is represented on the map as in block 41. Between block 41 and 40 is Chestnut street. Block 40 fronts on Third street. On the corner of Third and Chestnut streets is a brick house. That lot was not used or occupied by the railroad company for any purpose whatever, to my knowledge; that is, that portion of it occupied by the brick block. From 1853 to 1856 I was in the employment of the road; in 1856 & 1857 I don't pretend to know a great deal of what transpired. As to the balance of that lot, I don't recollect of its being occupied by the railroad. All east of the railroad track the railroad company did
108 occupy. I don't know that any portion of lot 9, which appears to be a vacant lot with no description as shown on this map, or any portion of it, was ever occupied or used by the railroad company. I recognize on the map the three-story drug store. The railroad company did not occupy that drug store, to my knowledge.

If I recollect rightly, there was in here somewhere, lot 8, a building occupied as a saloon; just where it stood I could not say. If it was occupied as a saloon the railroad did not occupy it. There was a large vacant space the railroad did occupy. The most of it was occupied by the railroad company. I should say the railroad company commenced to occupy lots 8, 7, and 6 to a certain extent in 1854 or 1855. In 1854 only six miles of track was laid. The company used the warehouse east of the railroad track. I cannot tell when it was built. I was not on the road in 1856 or 1857; possibly built in 1858. It used that warehouse until the property went into the hands of the Milwaukee and Minnesota Railroad Company. I don't know whether the Milwaukee and Minnesota Railroad Company ever did take possession of any portion of that property marked on that map as "Tibbits & Starkweather's Salt Warehouse." I know there used to be a warehouse in lot 3 in the center of block 40, marked "Warehouse used for stable." It was used as a depository for nails and spikes and everything else. I don't
109 know whether the Milwaukee and Minnesota Company ever went into possession of part of lot 2 except such portion as by the map appears to be used for the track. Block 33, Sherman's addition—vacant lots; the northeast corner of lot 1, now used for a cattle yard; the brick building is used by the city engine-house. I know it was used prior to 1867 for railroad purposes—the whole of the block. Block 33, the memorandum on the map is, "These lots lie on a bluff and partially in a ravine; none of it used except the southeast corner of lot 1." That was used as a right of way. This map, if it is strictly correct, shows it differently. The lots lie on a bluff and partly in a ravine. I cannot tell what the slope of the bluff is. I have no knowledge of any other use having been made of that particular property which is all marked in red, except simply for the right of way. Block 48 is mostly on the slope from the canal up to the grade. I should think the whole of it was necessary for railroad purposes. I do not remember just the difference in height, but there were a good many feet, and quite a large slope there. That slope would cover, I am pretty sure, about all that lot. I consider it necessary for the right of way; it is used for no other purpose. It might be used for the purpose of enabling a short side track to be put in. I don't know of any other use it could possibly be put to. It is on a very high slope. Following the line right

along block 47, the strip that is marked in red, that is the reserved acre, and is endorsed on the map, "This tract has never been used for any purpose except the railroad passing through said tract in a cut; land much higher than the track." That is all it has been used for. There have been cars stored there; side tracks, one or more. There was a portion of this used for obtaining gravel, and the gravel was taken off down to the hard pan. The description that it "passes through said tract in a cut, land much higher than the track" is, I shoud say, as to part of it true.

The time was when there was a good deal more business done on these depot grounds than now. There have been tracks there that have been taken up. My recollection is that the endorsement on the map as to block 13 is substantially correct. I think it was used with more than one track. I should say it was from January, 1858, to 1864. I don't know anything about it after 1865. I don't know how it was occupied or what uses, if any, were made of it by the Minnesota Company. I don't know of my own knowledge that that company had possession of anything more than the right of way. As to the lots in block 13, I can say that my impression is that outside of the right of way, I have seen them piled with telegraph poles or posts. I would not like to say positively I ever saw them there; I think I have. I would not like to swear positively that the entire strip of land was ever used for any purpose after 1858 or 1859 than the mere right of way. I know nothing whether it was ever used by the Milwaukee and Minnesota Railroad Co. Lots 7 and 8 in block 13 stand about in the same light as described on the map. I have an impression that they used it. Block 21 on the red part of the map is this endorsement: "This lot was all occupied by an old freight house, now used as storehouse for wheat and flour, by Sanderson, of the Phœnix Mills." Prior to 1867 there was a warehouse built that covered the whole block, and a large business was done in it. I don't know that lot 8, block 22, was ever used for railroad purposes. There is a street intervenes between it and the railroad tracks, lot 16, in block 22. I have no recollection of having seen it used. I don't remember of the company making any use of it. It may have been used, and may not. Lot 7, in block 30, was in general use. Where the road first started there was a car-smith shop on lot 3 in block 30. We had no machine shops; a good deal of the rough work was done on this block. It is the company's blacksmith's shop. I am very certain the frame house was there. I have seen a good many cords of wood piled on the tract of land which is marked on the map as follows: "This tract has always been vacant; this tract is 670 feet long by 30 to 36 feet wide." It was so used preceding 1864. I don't know to what use it has been put since that time, except for right of way. I am pretty certain all above the slope, all except the side hill there, was used. I know we had but very little ground there but what was used in some way or other. I cannot fix the various purposes for which it has been used. I am quite certain we had some cattle yards in a portion of the block.

I don't know whether the Milwaukee and Minnesota Railroad Company used any of that property at all. I do say that the lands which were not used and occupied by the railroad company for railroad purposes were necessary for such purposes. The railway company, in the business they were doing from 1860 to 1864, was much cramped, and was scant of room, instead of having any to spare. This corner, for want of other room to run tracks on, would have been almost invaluable to us. It is so with a good deal of it; some of this land we had, the company

hadn't really the means to improve and make use it. The La Crosse Company became embarrassed in 1857. We did a large business; at the same time the company was poor for years after. They would have been, by anybody that could have used them, considered necessary.

Redirect examination:

Block 33 would be rather difficult to use; there is a spot there
113 that would be troublesome on account of the deep filling & cutting. It would have been very desirable for the company to have everything up to the extreme ends of the corners.

Plaintiff's counsel moves to strike out that answer as irrelevant, immaterial, and incompetent. Motion denied; answer allowed to stand; and said plaintiff, by his said counsel, did then and there except.

D. J. WHITTEMORE, called as a witness for the defendant, testified that he was a civil engineer in the employ of the defendants—in the employ of the defendant as a chief engineer, and had been in the employ of the defendant since its organization. Had been in the employ of the La Crosse and Milwaukee Railroad since 1853, with the exception of 1857 and some time in 1860 or 1861. Has been constantly engaged in the business of civil engineer on railroads since 1848. Is acquainted with the business of locating railroads, arranging their tracks and depot grounds, and the necessary conveniences for transacting the business. Am acquainted with the grounds in question. Was with the St. Paul Railroad at the time it surrendered to the Milwaukee & Minnesota R. R. Co. the property of the La Crosse & Milwaukee from Milwaukee to Portage City, and at the time it was surrendered to the Milwaukee and Minnesota Railroad Company. Was acting as assistant engineer
114 for Mr. Sill during all the time that Hans Crocker was the receiver.

I think the whole of the property marked red on the map shown me was in the hands of the receiver and of the Milwaukee & St. Paul Railroad Company after it was formed and was surrendered to the Milwaukee and Minnesota Railroad Company, with the exception of two lots in block 41—all the property on the west side of the canal which is marked in red. My impression is the whole of the property, with said exceptions, was surrendered under the order of the court by the receiver and the Milwaukee and St. Paul Railway Company to the Milwaukee and Minnesota Railroad Company. The receiver and the St. Paul Company did not retain possession of anything after that surrender. I know the circumstances of the property coming back into the possession of the St. Paul Company, and from that time I have had to do with the property as an engineer of the company. The property as represented on this map lying west of the canal is the property as it came back to the St. Paul Railroad Company by that surrender. There is a little mistake in the coloring of this map. In block 33, in the sixth ward, lots 5, 6, 7, and 8 are colored entirely, and my impression is there is a mistake in coloring those. Only so much as would be covered by the right of way 100 feet wide should be colored. There is a railroad extending
115 over that property, several lines of rails. It extends from the round-house to the south end of block 41. I am acquainted with the necessities of the railroad in regard to the amount of grounds it should have for the operation of its road, and, from my experience, I think I do know as a general thing what is required. I know the manner in which the La Crosse Railroad was operated up to 1867, except the time I was absent. Its passenger depot and elevator were situated on block 41.

Thereupon said counsel for said defendant propounded to said witness the following question: State if a railroad is to be operated from the round-house to that passenger depot and elevator, what lands were necessary for its successful and proper operation?

To which said question said counsel for the plaintiff did then and there object, that the same was irrelevant, immaterial, and incompetent; that it was a purely hypothetical question depending entirely upon the capacity and pecuniary ability of the road, and for the further reason that it seeks by parole to extend the description of the grant of the lands as specified in the decree. That the only question that can be put to the witness under this decree is for him to point out where the depot houses are located, show the station houses and the buildings. The said counsel particularly objected to the use of the word "successful."

116 in the question. Objection overruled. To which ruling the said plaintiff, by his said counsel, did then and there except.

And the witness answered: It would require to operate the road in the manner mentioned, certainly all the lands colored red lying on this side of the canal, between the round-house and south end of block 41, with perhaps the exception of lot 8 in block 22, an isolated lot. Not only that amount, but quite a considerable additional amount should be procured. The additional ground to be procured, I should locate between Walnut and Galena streets.

And thereupon said counsel for said defendant propounded to said witness the following question: Would any part of that land colored red, aside from lots 8 you speak of, on the west side of the canal, be detached and separated from the road without interfering with its successful and proper operation?

Same objection as to the last preceding question, same ruling, and the same exception to the witness' answer.

I think it could not. I wish to make a remark, if it is proper for me to do so. Take this reserved acre in block 1, up along the canal, where it is represented considerably wider than 100 feet, the slope, aside from the ground which is level, the slope running to the canal; occupy

117 the rest of the ground, and it may be said those slopes might be stricken off, but you would have to have a protection; then build a slope to protect it. Some of those walls are so steep no track can be laid on them, but they are slopes proper to a railroad. Up to the year 1861, what is called the reserved acre, there was only the main line and one or two side tracks in there. Immediately after that period we took the gravel off from a large portion of the reserved acre, and off of lots 1 and 4, 3 and 2, of block 1 adjoining, and used it in filling the passenger depot grounds, also filling the side track between Galena and Walnut streets, and the upper part of this excavation on that track was gravel; lower, four or five feet, hard-pan. A good share was excavated, and our incoming yard for in-freight was established there. The entire portion that is now graded there was filled up with tracks for the storage of our incoming freight. This was between 1861 and 1864; and the balance that was not excavated was treated as a gravel bed and had a gravel track. The whole of block 40, up to 1867, with the exception of a large portion of lot 1, was occupied with tracks and freight buildings, with the exception of a brick store. I think it is on 9 and 10 there was one building that was occupied by a commission firm; a small building, however. Some time between 1862 and 1864, the

118 company bought that building and used it as a storehouse for spikes and various instruments, and for quite a little time.

When the company first acquired the title that brick store stood there,

and it has been permitted to remain there ever since. My recollection of what was on the corner is indistinct; next to the cerner, however, in that space between the main line of the railroad and the corner fronting Chestnut street, was a building which is there now—frame building, one story—occupied for some time as a commission-house, and afterwards purchased, I think, under Crocker's administration as receiver, and used as a tool-house for the storage of spikes. During this year there was a saloon on lot 5, west of the railroad, on, I should judge, the south half of the west part of lot 5. The time that was removed I cannot say. It was removed, I think, before 1865; I am not certain about that, however. With those exceptions the whole of block 40 was used in the business of the company. Blocks 30 and 33—there was one freight-house extending over the whole block, 800 or 900 feet long. There was a track back of it or to the west of it, around it. There is another triangular building now west of that, called the Horicon Freight House. The balance of the portion here colored was used as team tracks for teaming purposes, for
119 blacksmiths' shops, and the car repairer had a building on the western part of lot 3, and lives there. His shop was on the eastern part of it; whether that building was built by him there, I do not know. The whole of it, as colored, was occupied and used for railroad purposes. It was important for the company in 1867. In speaking of the property and the necessity of its use, I speak with reference to it in 1867. We then had a track across the corner of lot 16, block 22, or very close to it. It just crossed the corner. There was a necessity to acquire at least a portion of that lot. Lots 1 and 4, 7 and 8, block 13, has a main line over the eastern portion of it, and a side track also. There are corners of this land that have never been used to my knowledge to any considerable extent for railroad purposes. A small portion of the western end is some ways below the track. It is from fifteen to twenty feet below the track. It is necessary, a large portion of it, for the embankment. I think I have seen telegraph poles and posts there. Sixty feet from the center of the line was necessary, I should judge. Lots 5, 6, 7 and 8, in block 33, although fully colored on the map, I think the only title the company have is to the right of way on the east side, 100 feet wide, and I think it is an error in coloring. The company did not occupy beyond the right of way, unless it be a slope running down there. I am
120 talking of block 33, in Sherman's addition. This property is on the north side of the river. I thinkthe whole of lots 7 and 8, with the exception of that part on the west or north side not embraced in the right of way line, would be called east. The company owned all east and west as far as 50 feet from the center line.

There is a piece between lots 83, 84, 85 & 86 which is simply right of way. The main line of the road crosses lots 83, 84, 85 & 86, all on the lands of the company, extending from fifty feet west or north of the line to the canal, with the exception of one acre at the intersection of the canal with Humbolt avenue; that land had at the time referred to several side tracks and wood sheds, and a cattle yard. The land is, a very small portion perhaps of it, level; the other portion is taken up by the slope running to the canal, and that portion was used for several years after 1861 as a cattle yard. Not only that, but we rented that acre for the same purpose; in fact, it was about the only cattle yard we had for that portion of the road. I believe there is a block here that I have not mentioned—the first one, block 41; block 41 was entirely used for railroad purposes, with the exception of a small tract west of the rails, between them and West Water street; I think 50 by 20 feet. I think there is a building adjoining what used to be a passenger station there

on the south—sadler's shop. That, I think, was not used for railway purposes; I cannot recollect it was ever used; that portion 50
121 by 20. A small brick building this side of that was occupied by the La Crosse and Milwaukee Railroad Company general office, and at the time referred to were used as a janitor's residence, in charge of the general office there, and for storage of old papers and one thing and another, documents belonging to the company; and I believe it has been occupied by the baggage men and janitor since, continuously. Some time after the erection of the main passenger building there, I think what is now known as that shop was put up.

That portion of block 41 west of the tracks and south of the passenger buildings and the buildings last mentioned, was used as a place for delivering baggage, a place for omnibusses to come on the arrival of trains, and baggage wagons; I mean lots 8, 9 and 10. That part of block 41 south of the elevator and next to the river was for many years used for receiving lake freights, such as railroad iron, ties, salt, &c., and latterly, up to the time the Minnesota Company had it, was used as a place for receiving iron ore brought in on the road. After 1869, the road was built around the city; of course there was no occasion for it then; then the parts of lots 1, 3, 4 and 5, west of the railway line, and between that and West Water street, was used for discharging baggage trains, making up and going out, and piling material, ties, fence posts, and the like of that. The balance of the block east of the rail-
122 way is covered by elevators.

And thereupon said counsel for said defendant propounded to said witness the following question: Was there any part of that map that is colored red on the west side of the canal, except lot 8 in block 22, but what was necessary in 1867 for the proper and successful operation of that railroad?

To which said question said plaintiff by his said counsel did then and there object as irrelevant, incompetent and immaterial. Said objection was overruled, and the question allowed; to which ruling said plaintiff by his counsel did then and there except.

And the witness answered: No, sir; I think not. What I mean by that, saying it was necessary, is this: that all the property colored here as owned should have been owned; not only that, but more. And perhaps in a few instances we would have to own more in order to make certain portions available.

And thereupon said counsel for said defendants propounded to said witness the following question: Considering the necessities of the road, its proper operation and conduct of its business, could any of this property have been dispensed with as the road was up to 1867?

And to which said question said counsel for said plaintiff did then and there object, as irrelevant, incompetent and immaterial. Which objection was overruled, said question allowed, and
123 to which ruling the plaintiff by his said counsel did then and there except.

The witness answered: It seems to me I have stated that there were certain corners here that were never occupied; excepting those corners, I must answer that no part could be dispensed with. As I understand I have no liberty to say what were its wants in view of its necessities, and in the proper operation of the road and the conduct of its business, I should say that none of that property could have been dispensed with.

Cross-examination:

The La Crosse road began to be operated to any considerable extent

when it got to Schleisingerville, which I think was in 1854 or later. Schleisingerville is thirty miles from Milwaukee; it might be considered to have commenced operations when they got to Hartford, thirty-four miles from Milwaukee; this was in a few weeks after getting to Schleisingerville. The road was completed to La Crosse in 1858; the distance from Milwaukee to La Crosse is 196 miles; I went into the employ of the road the fore part of 1861. I think the La Crosse & Milwaukee Railroad did not have, in 1861, all the lots that are marked on the map in red; there were some lots in block 41, I believe, but I
124 cannot tell the lots. I know this, that there was a time in 1861, after this road was completed, that it did not have some portion of the lots in block 41, of which I am speaking. I know that deeds were taken for some property there after that date; it is my impression that from 1858 to 1861 the railroad was operated from La Crosse to Milwaukee without some of these lots in block 41; I cannot answer definitely. I think the line of the La Crosse road was completed from Horicon west to Beaver Dam in 1856.

Witness is here shown map exhibited by the plaintiff's counsel, and says Block 41 on that map was occupied by the railroad company in the year 1861, except about 40 feet by 50 on the north of the present large brick building used as general offices and passenger depot and the saddler's shop, occupying about 20 by 50 on the south side of that passenger house. I cannot place definitely the time the building was occupied by Allcott as a grocery store. I think the railroad did not occupy the lot at the corner of Chestnut and Third street. That lot is about 20 feet square, in the southwest corner of lot 10, block 40. I cannot remember that it was ever used for railway purposes. I think that portion of the lot east was occupied prior to 1861 or 1862 by Van Kirk and McGeoch as commission house. I think the company used the building in
125 1862 for the storage of tools, railroad spikes, and articles that were convenient to load on passenger trains to send out on the line of the road. I think the Milwaukee and Minnesota Railroad Company occupied it. I do not know of my own knowledge. I don't know that they ever took the building at all. The La Crosse company may have used a little of the part north of corner adjoining the western track—a small portion thereof; but not to the street, within my knowledge, from 1861 to the present time. I don't think any part of the lots fronting along the street were used west of the railroad track by La Crosse Company. I know of nothing for which they were used during that time. I don't recollect of the strip which is marked "Wood-shed, used for the storage of old boxes," ever having been used for railway purposes up to 1867. The strip marked "Bought of Enno Meyer in 1854, and used by him, including 10 ft., &c.." is what is known as the brick drug-store. The whole of this is about 50 feet by 80. It was used as a drug store and has been so used for a number of years, and I do not think was used for railroad purposes from 1858 to 1867. Lots 6, 7, & 8, north and beyond the brick building, have been used at various times during the whole period from 1858 to 1867. As to block 33, Vliet street, that was very near the south end of the freight-house, or was at the time
126 referred to. There was a passage between that and the brick engine-house, and it has been used for freight-houses and for offices. I think it has not ceased to be used for railroad purposes. The building has been removed, but the main track still runs across these lots. It is now occupied by the engine house, and is used as such, and a stable in connection with it, and which belongs to the city of Milwaukee. The engine-house has been put upon the property within the last

two or three years. Prior to that time it was used for a short time as a stable for the city engine-house, and comes close to the building built by the company.

And thereupon the said counsel for the plaintiff propounded to said witness the following question: Do I understand you that the railroad company has abandoned that for the uses and purposes of a railroad?

Which said question said counsel for said defendant did then and there object to, and his objection was sustained and the question ruled out. To which said ruling and decision the counsel for the plaintiff did then and there except.

The property was used and occupied by the company during the receivership of Hans Crocker for a general freight-house and for offices. The map describes the freight-house as it is now, and not as it was then.

The entire property, as marked in there, is now used by the city.

127 Blocks 22 and 30 are represented on the map shown me, and show the line of the railroad track. The whole of lots 3, 6, & 7, of block 30, was used for railroad purposes, except a portion. I don't know whether I want to except that there was a dwelling-house on there, permitted to stay there, and to be used by our car-repairer. I do understand that when I am asked as to the necessity of land for uses and purposes of railroads it does include land oftentimes for the use and possession of the operatives of the road. I mean by the word "necessary" that in particular instances it is necessary that lands be used for the use and possession of the operatives; but whether this tract in this particular instance was necessary I don't know. I stated the fact that it was used by the car-repairer as a residence. The balance was used for repairs and team tracks—a place for teams to load goods. The freight-house extended nearly to that point, and the teams drove in from the street; and then there was another track ran here, which does not appear on this map. We frequently piled up posts and ties on this property. It was so used at and prior to 1869. The dwelling house was used prior to 1867, block 22, lot 16. In laying out tracks in here, we cut off access to the street, Cherry street, and there was a suit. How it terminated I don't know. I don't know really what title we

128 have to that lot, but it was shown that the railway, if I recollect rightly, should acquire a portion of that lot.

I think, aside from the railroad company being entitled to something of a corner across that lot, no portion of that lot was used for railroad purposes prior to 1867. No use was ever made of lot 8, in block 22, for railroad purposes. Lot 7, in block 21, was covered by a freight house prior to 1867. The building covered lots 8, 7, and 6; lot 16, in block 22, has not been occupied for railroad purposes, but we have tracks running so close to the corner I think there was a portion of it acquired. Lots 7 and 8, in block 13, were used for railroad purposes prior to 1867, not the whole of it; I should say three-quarters of them were occupied; the balance was not used for railroad purposes and never has been. I will qualify that: Occasionally there has been telegraph poles piled on them. The grade of the road is from 15 to 18 feet above it. To make it available you would have to fill it and acquire other property. I should think 60 feet from the center line would be enough to protect the slope of the main line. I should say we had not enough property there in 1869. Before 1867 should want it for railroad purposes. We had as many side tracks as we could conveniently get in here. We would have to fill that up with cars on account of the want of room below; we

129 could shift them in here and unload them. We have had to stop clear up to the round-house, train aftert rain. We ought to have

the ground down here. It was in such a shape then, without acquiring other property we could not make it available unless we acquired property on the other side of it, which we never did acquire; it was not of any practical use for railroad purposes. I do not agree with the statement on this map as to the situation of the land known as the reserved acre. The description is: "This tract has never been used for any purpose except the railway passing through it." I don't agree at all with that description. The largest distributing yard we had on this end was on this reserved acre, and we got a large amount of gravel from it. The eastern portion adjoining the canal the gravel has been taken off. Lot 1, block 48, was occupied by tracks; our main line just touches the corner. Before 1867 there were side tracks all through it. I think we have only the right of way through 8 and 7, in block 33. We own a good share of 7 and 8, and the right of way across 5 & 6. That land, aside from the right of way, was not used for any purpose connected with the railroad. As to land next to Humbolt avenue, my impression is we owned only 50 feet. My impression is that in November, 1863, we used that land or a portion of it for a cattle yard. We rented that that is not colored red of the Quentin estate for the same purpose. It
130 is rather a steep side hill. My impression is that we so used it for cattle yards prior to November, 1863.

I know of no use that is now made of that property down the side hill. Take that part of block 41 marked on plaintiff's map "Open dock yard," it was used probably more extensively than any other portion of that block, except the passenger building, prior to 1867. The first rail laid was landed there; many miles of iron was landed there for laying the road. Goods and merchandise were landed on that dock after the completion of the road. The property called Higby's Elevator was occupied by him during the year 1867. I don't know whether it was in 1867 or 1868; I think Higby was not running it in 1867. I think the company owned it. Crossing Chestnut street, the warehouse extending from that street to the south side of lot 1 was occupied, I think, by George Tibbitts; he was a man connected with the transportation lines on the Lakes. It was built while I was absent from the road. I don't know when he came into possession of it. He stayed there until the main business was done in the south Milwaukee yard. He stayed there from 1861 until 1865, within my knowledge. I was present on the road at the time the road was delivered over by the La Crosse Road to the receiver, and afterwards to the Milwaukee and Minnesota Railroad
131 Company. I think the company had possession of all the property marked in red in block 41 at that time. I should judge that the Minnesota Company took actual possession of this property. I mean by possession whatever claims we had or the receiver had at one time was handed over to the Minnesota Company. I think very likely the Minnesota Co. ran a drug store; I know nothing about the harness shop. I could not say whether they took possession of any of those buildings. They took possession of the passenger depot, but whether the possession of the other buildings in lots 10 & 9, block 40, I could not say. My impression is they used that in block 10 which had been used as a storehouse. I don't want to say they did, but my impression is strong they did use it. The company afterwards changed the line of its road and ran around the city instead of coming in at the old La Crosse depot. I think that was done in 1869.

Redirect examination:

Tibbitts was agent of the transportation line, and received and discharged goods in a building belonging to the company; the goods com-

ing to and going over the road. I don't know on what terms or how the business was done. He now occupies a warehouse of the company, paying no rent. I understood he paid no rent for this property, I do
132 not know. I understood it was a warehouse for the receipt of lake freights. Mr. Tibbitts was agent of the transportation company, and looked after their interests. Goods were delivered to us in the building. Goods were received for the purpose of being delivered to us or the railroad company. The company received freights that were going by lake through that building. I understood it at the time to be a mere arrangement for the convenience of the railroad, and to be a proper method of conducting the business of the railroad.

JOHN C. GAULT, a witness called and sworn on behalf of the defendants, testified:

I am assistant general manager of the defendant; have been engaged in railroading for 25 years; know the grounds in question; know the tracks across lots in blocks 40 and 41, and the property there situated; have been there repeatedly.

Thereupon said defendant propounded to said witness the following question: In order to conduct that railroad going onto those blocks to that passenger depot, state whether it is necessary that the company should own those two blocks.

Which said question said plaintiff by said counsel did then and there object as irrelevant, incompetent and immaterial. Which objec-
133 tion was overruled and question allowed. To which said ruling said plaintiff by his said counsel did then and there except.

And the witness answered: Well, it would seem to be necessary to own them. At least, any person obtaining lots for depot grounds in a city like this would certainly want all the lots on the block, if they intended to use most of the block. It is very poor policy to have one lot that would obstruct the use of all the rest. The depot grounds would not be complete without the whole block, it seems to me.

And thereupon said counsel for said defendant propounded to said witness the following question: Could the railroad dispense with this portion of this block on the west side of that road there with any degree of propriety in regard to other property?

Which question was objected to by the counsel for the plaintiff as calling for testimony which is irrelevant, incompetent and immaterial. Objection overruled, question allowed, and to which ruling said plaintiff by said counsel did then and there except.

And the witness answered: I scarcely think they could dispense with it. The track on this property comes nearly in the middle of the property. The property between where the track is and the street has not been occupied, as I understand, by tracks at any time, but in
134 order for the public to do business with the road, they would have to have passages from the tracks in some manner. I am acquainted with the lines of the St. Paul Railroad as they now are.

Question propounded by the counsel for the defendant: When the business of that road was done at the northern yard or prior to the building of the track around the city in 1869, state whether the grounds there at the northern yard were any more than sufficient for the transaction of the business of the road.

Which said question was objected to by the counsel for the plaintiff as irrelevant and incompetent and immaterial, and because the same was purely a hypothetical question, calling for an opinion which involves necessarily several distinct items of facts to properly state, which facts are not before the court.

The witness in reply to a question from the court says: I had no definite knowledge of the business of the road, its extent and necessities for the proper transaction of the business in 1869. I only had such knowledge as knowing the extent of the business they did. I was at that time on the Northwestern road, and had a pretty good idea of the amount of grain they were handling. I was not then connected
135 with the road. I was frequently at the depot during that time, as far back as 1859. I was in the habit of coming here to arrange rates and do business with the La Crosse road. That was the only knowledge I had, simply a general knowledge, without knowing definitely what their facilities were.

Which said objection was then and there overruled, and the said question allowed, and to which said ruling and decision said plaintiff by his said counsel did then and there except.

And the witness answered: I am not able to answer definitely the question. I knew the extent of the business they were doing, being on a neighboring road. I was not familiar with the necessities they then had. Since I came on to the road and have seen the places where they done the business I have been led to wonder that they should do so much business with such poor facilities. The property is very poorly adapted to railroad use, any way, on account of the fact that the lines run through the lots obliquely. There are some corners there that could not be used, and every place where there is a place they put a building, and still the room is scant, with the exception of block 40. I believe they would use all of it. I do not, of course, expect to answer the question definitely from personal knowledge, only in a general way.
136 I should have said block 41. Block 41 is the block I should have referred to. As to block 40, I understand they never did use all of it although they supposed they had acquired all of it. I should say any person who would provide depot grounds for a company, and not get the whole—leave lots and blocks that would obstruct the use of the rest—would be unwise. Whether they made use of it or not, I don't know. It would be my view, if I was buying depot grounds, that it was a necessity to have blocks 40 and 41.

Counsel for the plaintiff moves to strike out the answer of the witness, as calling for testimony that was entirely irrelevant, immaterial, and incompetent. Motion denied; and the said plaintiff, by his counsel, did then and there except.

H. C. ATKINS, a witness called and sworn for the defendant, testified:

Am superintendent of the La Crosse and Prairie du Chien division of the defendant's road; have been engaged in railroading 20 years; am acquainted with the depot grounds of the old La Crosse Company in the city of Milwaukee; have known the most of them for the past twenty years. With the exception of two years, have been connected for the most part of twenty years with the defendant's road. The line of
137 the railroad from the round house in the 6th ward to block 41 is colored red on the map exhibited to me. I am acquainted with the whole length of the line within those limits, and have a general knowledge of the amount of business done on that line. Know something of the number of cars and locomotives that have been in use there. Have been acquainted with the manner in which the business has been done there. I know the necessities of the railroad for depot grounds, and the extent of them.

Counsel propounded to said witness the following question: Now, I

ask you whether there are any grounds there that were not actually necessary for the use and operation of that road?

Which question was objected to by the counsel for the plaintiff as irrelevant, immaterial, and incompetent; and, further, because it has now been conclusively proven that there are lands which the railroad did not use during the whole time of its business, and the question, therefore, calls for a mere opinion against the positive fact in the case. Objection overruled; question allowed; to which ruling said counsel for the said plaintiff did then and there except.

And the witness answered: It is my opinion there were not; no grounds that were not actually necessary.

138 Thereupon counsel for the defendant propounded to said witness the following question: Taking into view, in 1867, as the road then was, was it necessary for its successful and proper operation and management that the whole of block 40 should be owned by the railroad company?

Objected to by the counsel for the plaintiff, for the same reason as the last above mentioned question. Objection overruled, question allowed; and to which ruling said plaintiff, by his said counsel, did then and there except.

And the witness answered: I think it was.

Said defendant's counsel propounded to said witness the following question: Could any part of that block that is colored red upon that map have been disposed of or dispensed with by the company, having due regard to its necessities, present and future?

Same objection; objection overruled; question allowed; and to which ruling and decision said plaintiff, by his said counsel, did then and there except.

And the witness answered: I think not.

Cross-examination:

In 1866 I was on the Winona and St. Paul R. R. as superintendent; in 1867 on the McGregor Western. I had nothing to do with the
139 business of operating the road from the city of Milwaukee to La Crosse during that time. I am not familiar enough with the map to call off the lots and blocks where the depot was located of the La Crosse & Milwaukee R. R. in the years 1866 & 1867. I can call the blocks, but not the regular lots. I do not know where the station buildings were by lots and blocks. I never used the term "lot" or "block" for the passenger or freight depot, or anything of the kind. I can tell where the passenger house or station house of the La Crosse & Milwaukee Railroad were during 1866 and 1867, in block 41, but I cannot give the specific lots in that block. There are several kinds of station-houses, the in-freight and out-freight house, elevators, &c. I think 30 was the in-freight house. There was a freight-house on block 30, and another on block 31. I think the offices—I would not be certain—were on block 33. I cannot tell you whether that includes all the station buildings that were occupied by the La Crosse & Milwaukee Railroad in 1866 and 1867. I have not sufficient information to give an accurate statement of what were either depots or station buildings in 1866 or 1867.

LOUIS B. ROCK, sworn for the defendants, testified:

140 Am superintendent of the Northern Division of the Milwaukee & St. Paul Railroad. Have been engaged in railroading a little over 22 years. Have been superintendent, or doing the duties of super-

intendent, a little over nine years. Am acquainted with the line of road known as the old La Crosse road. That road is in my charge from Milwaukee to Portage, and from Horicon to Berlin, Oshkosh, and Winneconne. Have been superintendent of that part of the road a little over nine years.

The map shown me represents the location of that road from the round-house to block 41. That road I have always understood, owned the lands colored red, and it has always been so represented to me; I mean that colored red on the west side of the canal, from Humbolt avenue to block 41. There are two small pieces claimed by Mariner in block 41, which is not owned by the defendant. The south of the pieces is between a little residence and the depot, formerly used as a saddler and harness-maker's shop. The other is north of the passenger depot, adjoining, formerly used by John D. Allcott as a grocery store, at present as a butcher shop. Those are the pieces the railroad company is not in possession of, and they never have been in possession of those two pieces in the nine years I have been there. I have always considered the balance to be in the possession of the road, and under-
141 stood that there has no one else occupied it but the railroad company for railroad purposes.

Said defendant's counsel thereupon propounded to said witness the following question: State whether in your opinion there is any ground that the road are in possession of there, save that lot 8, but what is necessary for the business of the road.

Objected to by the counsel of the plaintiff for the reason it is irrelevant, immaterial, and incompetent. Objection overruled. Question allowed; and to which ruling said plaintiff by his said counsel did then and there except.

The witness answered: I think it is all necessary; I found it so while I was operating the road. I took possession of it as superintendent on the 27th day of November, 1867. There had been no change substantially in the state of things from March until November. There are portions of block 40 that are covered with buildings that are rented by the railroad company. There was a warehouse near the track fronting on Chestnut street, that was used as a warehouse when I went there—storehouse. It was on the west side of the track. It occupied a space about four feet between the track, and the building was not occupied. Did not extend to Third street. There was another little building
142 on the corner used as a jeweller's shop, between that building used as a warehouse, and Third street. That building did not cover over 20 feet square; the balance of that between Third street and the track on Chestnut street was occupied by a warehouse.

There was another small wooden building between the drug store shed and the little jeweller's shop. That was about 16 or 18 feet front, fronting on Third street; the building itself occupied probably about 30 feet back, and the balance was a little yard. I am now speaking of the lots in block 40. There is nothing between the little building but the yard, to the railroad track. There was a shed between the drug store and that building connected with the drug store; I should think the shed was about 12 or 15 feet, running lengthwise of the drug store. The drug store is a three-story building of brick, I should think probably not to exceed 18 or 20 feet wide, running from the street sidewalk within four feet of the track; fronting on Third stret, running back to within four or five feet of the track; I mean of the west rail of the track. No other buildings there on the west side of the track. A little vacant piece of land runs to a point up to Poplar street, and was used when I first took

charge of the road, for teams to come up to the cars, and express wagons. There was a connection with the railroad. I have given you
143 all the buildings that were on block 40 west of the track. When I went there the warehouse east of the track was used for merchandise received over the road to be shipped by water, and to receive freight from boats to go upon the railroad. It is what is called Tibbitts Warehouse.

Question. What I call your attention to is a warehouse fronting on Chestnut street in lot 10 block 40, that runs along on Chestnut street.

Ans. We stored our traps and one thing and another there, put some flour in there; and once in a while pork that was shipped in. It was not used long for that purpose. That was the use it was put to when I went onto the road in 1867—was used in connection with the road. The little building on the corner, twenty feet square, was used as a jeweller's shop. A man by the name of Bruce occupied it as a jeweller's shop. He has paid rent to me since I went there. The little building which stands north of the jeweller's shop is occupied by a man of the name of Winterfield, I think as a tailor's shop; he pays rent to the St. Paul & Milwaukee Company, and he has paid rent all the time that he has been there. A man by the name of Sullivan now occupies the drug store and shed, and all connected with it. It was formerly used as a drug store; was so used until within the last two years; has been occupied by two different parties. Rent has been paid the whole time to
144 the St. Paul R. R. Co. The whole of the rest of that block has been occupied by the railroad company all the time.

I should think the distance from Cherry street north to the north side of the brick store was about 100 feet. I never paid very close attention to it. I should think the corner building is about twenty feet. It is simply a guess. I should think the next building was about 18 or twenty; they stand close together. The shed, I should say, 12 feet, perhaps fifteen, and the drug store eighteen or twenty. This is simply a guess. It would make somewhere in the neighborhood of 60 or 70 feet. I don't think it was over 70 feet from the corner, still it might be a little more. I think it extended back on Chestnut street about twenty feet. The rest is occupied by the warehouse, and was occupied by the railroad company previous to my going there. Block 41 has been occupied by the railroad company, with the exception of the two pieces occupied by Mr. Mariner, and was so occupied when I went there. Blocks 30 and 33 we used to pile things there, such as telegraph poles, fence poles, &c. Block 30, all that part colored red, is occupied with buildings. Lot 16, in block 22, was occupied by lumber, unloading cars with lumber, and one thing and another, with teams.

Block 21 was occupied by a large triangular warehouse to store
145 heavy freight in. It covers the whole thing. Block 21, lots 1 and 4, there was no occupation of those lots, it was a cess-pool. Block 1, and the reserved acre, so called, was occupied by side tracks, a place to store cars; there were three side tracks there. Block 33, we have nothing up there but a hand-car house; it merely touches the lot. Lot 1, block 48, is a very steep bank, from the track down. The upper part of lot 83, next to Humbolt avenue, was used for stock yard, and the balance inside of the line was used for wood. We had woodsheds on the east side of the track. The woodsheds were about 300 or 400 feet long. Pretty much all of it was occupied down to the canal. The main track went west of the shed, and on the east was also another track around behind the shed, and to the east of that track; east the vacancy was used for piling wood. There is nothing else there.

The cattle yards were next to Humbolt avenue, and run pretty close up to the right of way on the highway, and on the corner was a little building called the cattle office.

Ques. In 1867, was the whole of the property there necessary for the uses and purposes of the road, that the company owned on the west side of the canal ?

(Question objected to as irrelevant, immaterial, and incompetent. Question allowed. To which ruling said plaintiff, by his said
146 counsel, did then and there except.)

And the witness answered: Yes, sir; I find use for it. There was a small bank up near the canal, in block 1, that was not used at that time. It was sort of gravel; the whole of it was not covered with tracks; a large portion of it was. There were three side tracks.

Cross-examination:

Block 41 is the southern terminus of the road. The marks on lot 6, in block 41, were known in the year 1867 as the passenger depot buildings and offices. Only that one spot marked on the map was called at that time the depot. We call all of that the depot in block 41. That was the passenger depot and offices. There were no station buildings in that block, 41, at that time, except the elevator. I call the station building the one that is marked on the map "Higby's Elevator." I think that in 1867 it was occupied by a man by the name of Higby, who was in possession of it, but who gave up the possession to the St. Paul Railroad Company in 1868.

I was not in the employ of the Milwaukee and Minnesota Railroad Company. I have never been in the employ of the Milwaukee & Minnesota Railroad Company. I don't know as a matter of fact whether the Milwaukee & Minnesota Company ever were in possession of or did
147 use and occupy that elevator. I do not know whether during the time in 1867 that the road was being operated by the Milwaukee & Minnesota Company, what they did occupy as depot or station-house. Lots 1, 2, 3, and 4, in block 40, have been vacant, as is marked on the plat, and were used as a driveway for omnibuses, baggage-wagons, &c., to a baggage-room that was there. It has always been so used. There has never been any buildings there at all. There was at one time a barber's shop, and a kind of fruit stand, on the corner before you get to Chestnut street. We had a baggage-room on Chestnut street at the west track of the railroad. Otherwise than that there was no building on that property, except two small buildings on Chestnut street, which are used, one for a shoe-shop and one for a barber-shop.

This was in November, 1867. In 1867, lots 8, 9, & 10 were used for a stand for omnibusses and for baggage, &c., incoming trains. The warehouse, what is called on your map Higby's elevator, was an elevator used in connection with the road, and I call the station the whole yard and all the buildings and everything on it. The railroad crosses Chestnut street. The black lines on the map represent the railroad tracks as they were in 1867. The river is shown by a blue line, and is east of the elevator. I locate the little warehouse on crossing
148 over Chestnut; it is on lot 10, block 40. I think its location is pretty correctly represented on the map.

The brick house has been put up within two years. At the time I first knew it it was a wooden house, occupied as a jeweller's store. At the time I took charge the warehouse was used to put flour and pork in. I understood the president allowed the company to have it for that use. All I know of its being occupied by the company is the declara-

tion of third parties. It is the point on the west line of the west rail of the three tracks, crossing over onto the east side of the tracks; the two-story frame, it was used in 1867 as a justice office, then up stairs. I don't know whether it has been used for railroad purposes. The end part of it was called a warehouse simply; the upper story was used for freight. Tibbits & Starkweather's salt warehouse—it was not used as a warehouse then. In 1867 merchandise transported over the road and freight that was put aboard of the boats ran down the track. Tibbitts & Starkweather were agents for the transportation company. I understand the railway company built the warehouse. I know nothing about it. The side track as it appears on lots 8, 7, & 6, in block 40, was not there in 1867. Lots 8, 7, & 6 were used in 1867 for express wagons. We set our baggage car there, and used to use that as
149 a driveway. The express wagons were changed from lots 1, 2 & 3 & 4, to this point, on account of being too much crowded there. They unloaded their stuff there, and this place was always used for the delivery of express matter. Block 33 was used in 1867 to pile fence posts and telegraph poles—sometimes ties—in there. That part nearest the track and along the whole line of the track was so used. There was no dwelling house there at that time. The lot was vacant in 1867. No portion of the lot that is within the black lines was used by the railroad company in 1867. The city occupied it as it is occupied now, for a fire-engine house. We didn't use the lot in 1867 only as I told you. Block 30 represents the little warehouse. It is one of the depot buildings or station buildings, whatever you call it. The east line is the main line. The canal is between river and road.

Portions of 3, 6 & 7, block 30, were used by the railroad in 1867 for other purposes than the right of way. It was used for teams to unload lumber. I cannot say of my own knowledge whether the Milwaukee & Minnesota R. R. Co. ever used that in connection with the depot and railroad offices, and that statement is true of everything I have stated during the time the Minnesota company had possession. I only know from hearsay what grounds the Minnesota company
150 occupied for depot and station buildings during the time they were in possession of the property. I have no personal knowledge of it. There is no station building or depot on either of the three lots in block 30, and there was none there in 1867, and no building of any kind except a dwelling house. There was a building on the lot which was occupied by an employee of the company.

The line of the railroad is pretty correctly represented as it passes through lot 16, block 22, on the map shown me. The road crosses that corner of the lot just as represented on the map. I don't know whether the Milwaukee and Minnesota Company used and occupied that lot at all. I think there were no station buildings on that lot at any time, and no depot there. I think there was no building of any kind on that property then. I think there are some dwelling houses there, as they appear now on that plat. Going further north onto lot 7, it was used for warehouse and freight house. Crossing over Second street, that entire lot was never used for railroad purposes at all, except by employees—was not used in connection with the running and operating of the railroad. Block 13, lots 7 and 8, up Galena street—I don't know of any use it was put to. I think there was a warehouse, but it was not used for anything in particular. A set of track scales were put in there. The
151 character of the land is high bank, 12 to 15 feet. The balance of the property is good for nothing, unless it is filled. It would take a filling of 12 or 15 feet. As a matter of fact the railroad com-

pany have never used or occupied any portion of that for railroad purposes, except a small width to set scales. I should think lots 4 and 1 of the same block were both so close together it would be necessary to fill. I should think the property was only necessary for the support of the embankment, and of no use unless it was filled, and from 12 to 15 feet, as represented on the map, would be sufficient support for the embankment. I don't know that the balance of that property was used and occupied by the railroad company. Following right up on to block 1, the reserved acre—those lots have been used for side tracks. They were down there in 1867 when I took charge. The railroad passes through a cut. The land was cleared away and leveled down on the east side of the track, for side tracks, toward the canal. On the west side was a bluff, which had been cut, I think, 10 feet or more. I think there was one side track on the west side. Block 48, number 1, is east of the track; it was used for side track. I should think by the looks it had been a bluff equal to the one on the west side, and had been graded down wide enough to put in three side tracks. There is
152 a portion of the ground there that is a bank, between where they graded and the canal, which is high. It is not used for any purpose now; it has been used for gravel. I have taken some gravel off since I have been there. The same in connection with lot 2, in block 48; the land is below the track. I think the land up there is below the track. The railroad company used nothing except the southeast corner of the lot. Lots 7 and 8, a portion of lots 5 and 6, nothing more was used than the right of way. This is the woodshed lot which I have testified about.

I think a portion of the line, marked in red, was used for a cattle yard. As a matter of fact, I think there were some buildings in 1867 on a portion of this property, east of the railroad track, which were used for the dwelling houses of the employees of the company. There was a portion of the east part of this which was so used. I cannot tell or give any description of how much of it was used for cattle yards. They commenced at Humbolt avenue. There were no station buildings on this tract in 1867, and no buildings at all on the portion of the track west of the line of the road. I would not like to say that the cattle-yards extended on to this tract more than 60 feet. There was a fence along the line. All east of the fence was never used or occupied by the railroad company for railroad
153 purposes. It was used for a dwelling house for the employees. I have no knowledge of any use of any of this property until I went into possession in 1867. I know nothing about the condition of any of this property on the 11th day of January, 1867. I didn't go into possession until November, 1867.

Defendant's counsel offers in evidence deed of lot 8, block 41. Deed bears date 1st day of August, 1868; is made by Henry B. Rathbone and Clara A. Rathbone, his wife; Ira L. Rathbone and Pauline, wife of Ira Harris, by and with his consent, to the defendant, for the sum of $8,000.00.

Defendant's counsel offers in evidence deed from Frederick Rottman and Frederica Rottman to the St. Paul R. R. Co., made on the 8th day of April, 1869, of the south half of lot 4, in block 41.

Defendant's counsel offers in evidence deed from Hans Crocker and wife to the defendant of lot No. 8, block No. 22.

Defendant's counsel offers in evidence quit-claim deed, executed 22nd day of August, 1872, to the St. Paul Railway of this same lot.

Defendant's counsel offers in evidence quit-claim deed from Geo. Coggswell to the defendant.

Defendant's counsel, John W. Cary, stated, and read from the records, as follows: I think I have already stated that Hans Crocker, as receiver, took possession of the whole of the La Crosse road on the 11th day
154 of June, 1860, which is the fact. The testimony which I propose to give relates wholly to the matter of the possession of the property. I will state further that he was on the 18th day of May, 1860, appointed receiver of that portion of the road lying west of Portage City, conditioned that Bronson, Soutter and Knapp did not accept of the appointment, and his authority to take possession of so much of the road was that order in the case which I have not here. They were trustees of the mortgage; they were appointed receiver, but, in case they refused to accept, then Hans Crocker was to take the receivership, on their filing a refusal to accept.

On the 5th day of January, 1860, Sebra Howard commenced a suit in the district court of the United States for the district of Wisconsin, by Levi Hubbell, against the LaCrosse and Milwaukee Railway Company and Selah Chamberlain, in the nature of a creditor's bill, to enforce a certain judgment against the La Crosse Railroad; that such proceedings were thereafter had in that case; that on the 9th day of June, 1860 the following order was made in that suit, appointing Hans Crocker receiver:

And afterwards, to wit, on the seventh day of May, 1860, came the defendant, Selah Chamberlain, by his counsel, and, on his motion,
155 it is ordered by the court that the time for filing an answer be and is hereby extended to the first Monday of June next.

And afterwards, to wit, on the ninth day of June, 1860, came the parties, by their counsel, and the rule of the complainant for an injunction and for the appointment of a receiver having been argued on the bill, records and affidavits submitted, on consideration whereof it is ordered by the court that an injunction be, and hereby is allowed, according to the prayer of the bill, until the further order of this court.

Receiver.

And same day (9 June, 1860) the motion and rule of the complainant for the appointment of a receiver came on to be heard, and was argued by Mr. Hubbell and Mr. Carpenter for the complainant, and by Mr. Emmons for the defendant, Selah Chamberlain, the defendant, the La Crosse & Milwaukee Company not appearing. On consideration whereof, it is ordered by the court that Hans Crocker be, and he is hereby, appointed receiver of all the railroad of the said La Cross & Milwaukee Railroad Company, being all the line of railroad extending from the city of Milwaukee to the city of La Crosse, in the State of Wisconsin, together with all the depots, depot buildings, tracks, side tracks, engine-houses, buildings, fixtures, fences, locomotives, en-
156 gines, cars, furniture, tools, rolling stock, rights, privileges, and franchises, and all other personal and real property belonging to the said railroad company, and belonging to, or used, or connected with said line of said road (subject, nevertheless, to a previous order of court appointing him, the said Hans Crocker, to be receiver for the western portion of said road from Portage City to La Crosse), and be at once put into possession of the same and every part and parcel thereof.

And it is further ordered that the said Hans Crocker, before entering upon his duties as such receiver, shall give bond, with sureties to be ap-

proved by the judge of this court, in the penal sum of fifty thousand dollars, conditioned that he will duly manage and conduct said railroad and property, and for what he shall receive shall duly file inventories, and also file under oath, every month, accounts of his receipts and disbursements according to the rules and practice and directions of this court.

And it is further ordered that the defendants, and particularly the defendant Selah Chamberlain, deliver over to the said Hans Crocker, as such receiver, all and singular the said railroad from Milwaukee to La Crosse, and all other the real estate and premises before mentioned, and all and singular the rolling-stock, locomotives, cars, machinery, tools, fixtures, money, furniture and appurtenances, and other personal
157 property which belongs or has been procured for or used in connection with said railroad or any part thereof, which may have come to the hands of the said defendants, or over which they have control, and that such receiver take possession thereof, and take directly, or by such agent as may be for that purpose by such receiver duly appointed, the care, possession, management, direction, and control of all such property, and all the income to be had and received from the running, possession, and operation or use of the said railroad and property in anywise, and out of the same pay the expenses of the said receivership and the costs and expenses of operating and maintaining or preserving and keeping said railroad and other property and premises to be received by him as aforesaid, and then hold the balance of such money and receipts subject to the further order of this court.

And it is further ordered that the said receiver, and any other party in interest in this suit, have leave from time to time to apply to this court for further directions in respect to such property, and the management and proceeds thereof, as may be just and may be required.

There were no other defendants than the La Crosse Railroad and Selah Chamberlain to that suit.

In virtue of that order, and the one made in the Bronson, Soutter & Knapp case in the West Division, May 18th, 1860, Mr.
158 Crocker demanded, on the 11th of June, possession of the road. He found the property in the possession of Prentiss Dow, as attorney in fact of Bronson, Soutter & Knapp, the trustees in the Bronson & Soutter mortgage. On his demand they surrendered to him, and he took possession and control of the road on the morning of the following day. At that time the suit of Bronson & Soutter to foreclose that second mortgage was pending in the court, and on the 6th day of July, 1860, the following order was entered in that case:

JULY 6TH, 1860.

This day came the complainants, by their counsel, and on their motion it is ordered by the court that Hans Crocker be, and he is hereby, appointed receiver of all the railroad of the said the La Crosse & Milwaukee Railroad Company, being all the line of railroad extending from the city of Milwaukee to the city of La Crosse, in the State of Wisconsin, together with all the depots, depot buildings, tracks, side-tracks, engine-houses, buildings, fixtures, fences, locomotives, engines, cars, furniture, tools, rolling-stock, rights, privileges, and franchises, and all other personal and real property belonging to the said railroad company, and belonging to or used or connected with said line of said road (subject, nevertheless, to a previous order of court appointing him, the said
159 Hans Crocker, to be the receiver of the western portion of said road from Portage City to La Crosse), and to be at once put into possession of the same and every part and parcel thereof.

And it is further ordered that the defendants, and particularly the defendant Selah Chamberlain, deliver over to the said Hans Crocker, as such receiver, all and singular the said railroad from Milwaukee to La Crosse, and all other the real estate and premises before mentioned, and all and singular the rolling-stock, locomotives, cars, machinery, tools, fixtures, money, furniture and appurtenances, and other personal property which belongs or has been procured for or used in connection with said railroad or any part thereof which may have come to the hands of the said defendants, or over which they may have control; and that such receiver take possession thereof, and take directly, or by such agent as may be for that purpose by such receiver duly appointed, the care, possession, management, direction, and control of all such property, and all the income to be had and received from the running, possession, and operation or use of the said railroad and property in anywise, and out of the same pay the expenses of the said receivership, and the costs and expenses of operating and maintaining or preserv-
160 ing said railroad and other property and premises to be received by him as aforesaid, and then hold the balance of such money and receipts subject to the further order of this court.

And it is further ordered that the said receiver, and any other party in interest in this suit, have leave, from time to time to apply to this court for such further directions in respect to such property and the management and proceeds thereof as may be just and may be required.

And the same day (July 6, 1860) came the defendants, Sebre Howard and John S. Rockwell, by their counsel, Mr. Hubbell, and on their motion it is ordered by the court that the time for taking testimony on either side be, and is hereby, extended to the second Monday of August next, and that the testimony be taken by either side according to the rules of court.

Order appointing receiver modified.

JULY 7, 1860.

This day came the parties by their counsel, and also came Hans Crocker, the receiver, and made his report, from which it apppears, among other things, that there are mechanic's liens and mortgages upon the depot buildings and depot grounds of said road; that 35 miles of right of way remain to be secured and paid for; that one hun-
161 dred and forty miles of fencing remain to be completed; that there is due for rolling-stock purchased by Chamberlain while in possession of the road, and mortgaged to him by the vendor, $9,547.91; that the depot grounds are encumbered with taxes and tax deeds; and further, that there is an immediate necessity for the purchase of at least three locomotive engines and fifty freight box cars. Said report having been submitted by consent, and upon consideration thereof, it is ordered, adjudged, and decreed by the court that the order appointing said receiver be, and is hereby, modified, and the court doth now here order and decree in manner following:

That the said receiver shall have power to bring and maintain any action or actions necessary or proper in order to enable him to execute his duties, which actions or suits may be brought in the name of the La Crosse & Milwaukee Railroad Company, and in like manner he may defend any action or suit affecting the interests of the said company, so far as may be necessary to protect the property and interests confided to his care, or as may be necessary and proper to enable him to discharge his duties as such receiver. He shall have power to compromise and settle all suits or actions that have been or may be brought

against said company, so far as may be necessary to protect the
162 property committed to his care, upon such terms and conditions as to him shall seem most advantageous to said railroad or to said company or other parties interested therein.

He shall also have power, and is hereby authorized to compromise, settle, and discharge all lawful claims against said company or said road for right of way, liens upon depot grounds or buildings, taxes upon depot grounds, and special liens upon the rolling-stock in use upon said road, so far as may be necessary to protect the property of said company. He shall also have power to arbitrate or compromise on such terms as he shall deem most advantageous to the interests of the road, all claims for damages, for detentions or injury to persons or property arising from running or operating said road. The net earnings of the road shall be applied as follows, as far as may be deemed necessary:

To the payment of such sum as shall hereafter become due the State of Wisconsin for license to operate said road by virtue of any law of the State.

To the payment of all sums due operatives and employees of the road, and for materials or supplies furnished said road which have accrued since the first day of April last, but the receiver shall be authorized to pay any proper expenses incurred in the operating or manag-
163 ing of said road previous to that date, provided the same shall not exceed the sum of one thousand dollars.

To the payment of such sums as may be necessary to acquire the title to the right of way and depot grounds now used and occupied by the road.

To the payment of all sums due or that may become due to connecting roads on freight or passenger account in the ordinary course of business.

To the payment of the amount due on three notes given by Selah Chamberlain in the month of August, 1859, for part payment on the purchase of freight cars, and which are subject to a chattel mortgage to secure the payment of such notes.

To the payment of such expense as may be incurred in fencing so much of the line of the road as the receiver may deem necessary.

The said receiver shall have power and authority to purchase such locomotives and freight cars as may be necessary for the business of the road, but not to exceed three locomotives and fifty house freight-cars, and at a cost not exceeding fifty-four thousand dollars; and for such portion of the purchase money of such engines and cars as the receiver shall not be able to pay at the time of the purchase or
164 delivery thereof, he may execute to the vendor a chattel mortgage thereon, to secure the payment of such purchase-money in arrear.

To the payment of the costs of this suit, including the fees and charges of the solicitors and counsel of the complainants, incurred in this foreclosure, or that may be incurred therein, and all necessary expenses that have been or may be incurred in respect thereto, subject to allowance by the court.

The receiver, acting in pursuance of this or any former or of any subsequent order or decree hereafter to be made, in good faith, and with ordinary care and prudence, shall not be individually liable for any breach of contract entered into by him as such receiver, or for injury to person or property of the parties or of third persons, or for the faults or negligence of his subordinates, and for his indemnity against or exoneration from any and all such liabilities, should any occur, the prop-

erty, money and effects that shall at any time be in his hands as such receiver shall be bound, and may from time to time, as may be necessary, be applied in such manner as the court shall direct.

WITNESS. Under those orders Crocker took possession of all the property, real and personal, that was known to belong to the La Crosse Company. I know he exercised control from that time over the property in question; that is, on the east side of the canal. He continued to
165 operate the road in his own name until 1863, June 12th, when a certain order was made in the case, also in the land-grant case, discharging him from his receivership of the west end from Portage, and directing him to allow the St. Paul Company to operate the whole road as an entirety, accounting to him for the earnings of the eastern division. After the making of that order of June 12th, 1863, the road was operated, the east end of it, by the St. Paul Company, accounting to the receiver for the same until the order was revoked. And from that time until the 9th day of January, 1876, the receiver operated it by employing the Milwaukee & St. Paul Co. to do it. In other words, the St. Paul Co., after the recision of that order, received their authority from the receiver directly, and they continued to operate the road as an entirety up to the 9th day of January, 1866, when in pursuance of the order I have already referred to, made on the 18th day of July, 1865 (counsel reads order found on page 88), the Minnesota Company having complied with its terms, Hans Crocker, the receiver, and the Milwaukee and St. Paul Company delivered over to the Milwaukee and Minnesota Company all of the property, the railroad and all the property which he had received as receiver, from Milwaukee to Portage. We were merely the servant of Hans Crocker, the receiver, and had no rights except as he directed.
166 And in that delivery was included the lands in question. As I have already stated, on the 18th of April, 1866, suit was commenced on the Cleveland judgment, which resulted in the decree which has been given in evidence here—the sale under it. Such proceedings were had that a decree was entered and sale had, and confirmation of that sale the 5th day of March, 1867. On the following day, on presenting that order of confirmation and deed of the marshal to the St. Paul Company, I demanded of the Milwaukee & Minnesota Railroad Company the possession of the railroad from Milwaukee to Portage, and upon said demand the railroad and all its rolling stock was delivered over to the Milwaukee & St. Paul Company, and with it the lands in question. And from that time the St. Paul Co. assumed and exercised control over the whole of it.

I know these facts that I have stated, as general adviser of the St. Paul Company, and from the fact that I personally directed what should be done, and in some important parts personally superintended it.

Defendants rested.

Said plaintiff by said counsel did here move the court to strike out of the record all the evidence of the defendant which has been intro-
167 duced, for the reason that said evidence is entirely irrelevant, incompetent and immaterial, and does not in any way tend to show or establish a better or superior title in and to the lands in suit than the plaintiff has shown. And said counsel specifically moved to strike out the following exhibits and records:

First, the mortgage of the La Crosse Railroad Company to Barnes, dated June 21st, 1858, because said mortgage was executed subsequent

to the date of the rendition of the judgment of Sebre Howard against the La Crosse R. R. Co., in the circuit court of Milwaukee County under which the plaintiff claims his title, and that no proceedings of any kind, in any respect, anywhere, in any court, under the Barnes mortgage, can be used for the purpose of laying the foundation for a title in the defendant to the lands in this suit, as against the legal title which the plaintiff Howard has by virtue of his said judgment in the circuit court of Milwaukee County, and the sale thereon, and under his deed, recorded Nov. 20th, 1863.

Said plaintiff moved in the same connection, and for the same reason, to strike out the supplement to the said mortgage, which bears date the 11th of August, 1858; and also to strike out all the proceedings to foreclose the said mortgages, together with the articles of organization of the Milwaukee and Minnesota Railroad Company, for the
168 further reason that such foreclose proceedings are illegal and void; that there was no law of the State of Wisconsin in force at the date of the sale under the Barnes mortgage which would authorize Barnes, as trustee, to bid in said property at said sale, and that said Barnes had no authority by virtue of said mortgages, or either of them, to become the purchaser at said sale.

Which motion was denied, and to which ruling said plaintiff by said counsel did then and there except.

Said plaintiff, by his said counsel, moved to strike out the mortgage from the Milwaukee and La Crosse Railroad Company to Francis A. Palmer, dated June 30th, 1854, and the supplemental mortgage to the same party, under date of February 18th, 1856, for the reason that there is no evidence in the case, showing or tending to show that said mortgage, or the supplement, has ever been foreclosed, or that there has ever been a sale under it, or any legal title acquired under or by virtue of said mortgage. That the said mortgage and supplement to-day remain simply and only a mortgage-lien upon the property, subject, in the hands of the plaintiff, under his deed, to whatever amounts may be legally due thereon, and which he may be obliged to pay on his said purchase.

Motion denied. To which ruling said plaintiff, by his said counsel, did then and there except.

169 Plaintiff's counsel next moved to strike out the mortgage executed by the La Crosse Railroad Company to Bronson, Soutter and Knapp, which mortgages the road from Portage City to La Crosse, for the reason that said mortgage does not show nor tend to show any title to the lands in suit in the defendant, and there is no pretense that said mortgage covers the property in suit.

Motion denied. To which ruling the plaintiff, by his said counsel, did then and there except.

The plaintiff, by his said counsel, next moved to strike out the mortgage of the Milwaukee and Fond du Lac Railroad Company to the city of Milwaukee, under date of September 1st, 1853, mortgaging the first 18 miles from the city of Milwaukee (it was here admitted by the counsel of the defendant that the Milwaukee, Fond du Lac Green Bay Railroad Company was consolidated with the La Crosse Railroad Company, and that said company obtained $200,000 from the city) for the reason that the same is not shown to have been foreclosed, and remains simply and only as a mortgage lien upon the property.

Motion denied. To which ruling said plaintiff, by said counsel, did then and there except.

Said plaintiff, by his said counsel, moved to strike out the mortgage from the Milwaukee & La Crosse Railroad Company to the City
170 of Milwaukee, dated July 13th, 1854, covering forty miles from a certain point outside of the city limits to Beaver Dam, for the reason said mortgage has not been foreclosed; that it does not cover the lands in suit, and that it does not show or tend in any way to show any title to the lands in suit in the defendant.

Motion denied. To which ruling said plaintiff, by his said counsel, did then and there except.

Said plaintiff's counsel did further move to strike out the mortgage from the La Crosse Company to Bronson & Soutter, of the date of August 17, 1859, (it was admitted that there has been no sale under that mortgage,) for the reason that it does not show or tend to show any legal title in the defendant in or to any of the lands in suit.

Motion denied. To which said ruling said plaintiff, by his said counsel, did then and there except.

Said plaintiff, by his said counsel, did then and there move to strike out the mortgage lease from the La Crosse Railroad Company to Selah Chamberlain, dated September 26th, 1857, which purported to lease the whole line of the road, and also the judgment of Selah Chamberlain against the said La Crosse Railroad Company, of the date of October 2nd, 1857, for the reason that it does not show or tend to show any legal title in or to the lands in suit in the defendant.

171 Motion denied, and to which said ruling said plaintiff, by his said counsel, did then and there except.

Said plaintiff, by his said counsel, further moved to strike out the testimony as to the assignment of the judgment by Newcomb Cleveland to James B. Cross, and the assignment of James B. Cross to Selah Chamberlain, and the assignment by Chamberlain to the Milwaukee and St. Paul Railroad Company, for the reason that there is no evidence in this case showing or tending to show that said assignment, or either of them, were ever delivered.

At this point counsel for the defendant said that he was in possession of the whole of them, as the attorney of the railroad company.

Said counsel for the plaintiff then objected to the same, that they were irrelevant, immaterial, and did not show nor tend to show any title in the lands in dispute, superior to, or better than the legal title shown by the plaintiff.

Motion denied; to which ruling said plaintiff, by his counsel, did then and there except.

Said counsel for said plaintiff moved to strike out the resolution of the St. Paul Railroad Company, authorizing the sale of the Cleveland judgment to James, and to the record and the proceedings in the suit of Fred. P. James on the said Cleveland judgment against the Mil-
172 waukee and Minnesota Railroad Company, for the reason, first, that the resolution of the St. Paul Co. as irrelevant and incompetent; second, that the assignment of the judgment to James is not proven to have been delivered, and there is no evidence in the record that the assignment ever was delivered.

(Counsel for the defendant says he has the assignment in his possession.)

Ques. by Mr. FINCH. Do you know whether it was ever delivered by the Railroad Company to James?

Mr. CARY. I know it was; I understood it was to be; I don't know that I can say now I saw it delivered, but I know it was the arrange-

ment that was to be. I know I have had it in my possession; I know, by James' consent, I prosecuted the suit upon it.

Ques. James was at that time one of the directors of the Milwaukee & St. Paul Road, was he not?

Ans. If it was after 1863 he was.

Ques. Was he not on the 18th day of July one of the directors?

Ans. Yes, sir; that is, I admit the fact, if it is competent as testimony here.

PLAINTIFF'S COUNSEL. I shall insist, unless Mr. Cary is able to prove of his own knowledge that there was a delivery of the assignment of that judgment to James, that the assignment must go out. The mere fact that a piece of paper is produced here is no evidence that it was delivered by the Railroad Company to James, and I shall
173 insist, until there is proof of its delivery, that the assignment must go out of the case.

Plaintiff's counsel objects to the decree entered in the suit of James against the Minnesota Railroad Company and to the marshal's deed on the sale under that decree, for the reason that the suit was a proceeding in equity instituted by James against the Milwaukee and Minnesota Railroad Company and against no other party; that the plaintiff, Charles Howard, was no party to the suit, and never has had his day in court in said suit, or appeared therein, and that under no possible and under no conceivable circumstances can that decree give to the defendants a superior or better title against Howard than he has shown on this trial in this cause.

Motion denied. To which said ruling said plaintiff by his said counsel did then and there except.

Said plaintiff by his said counsel moved to strike out the record of the board of directors of the La Crosse Company, showing that the said company ceased to exist on the 26th day of May, 1859, or from and after the 11th day of February, 1859, because said record does not prove nor tend to prove that the said La Crosse Railroad Company ceased to exist on that day, nor is it proper evidence of the fact that it ceased to exist; that it purports to be only a mere entry in the direct-
174 ors' book of the proceedings of that meeting of the board of directors.

Motion denied. To which said ruling said plaintiff by his said counsel did then and there except.

Said plaintiff's counsel moved to strike out the order of June 11th, 1860, putting Hans Crocker into possession of the road as receiver, for the reason that it does not appear that any one was heard in relation to that order except Mr. Carpenter for the petitioner, the Milwaukee and Minnesota Railroad Company, and Mr. Cary for the St. Paul Railroad Company, and it does not appear that any proceedings were taken to bring Chas. Howard in, or that Chas. Howard had any hearing in relation to that matter at all.

Motion denied. To which said ruling said plaintiff by his said counsel did then and there except.

Plaintiff's counsel moves to strike out the stipulation, dated October 4th, 1862, purporting to be signed by Matt. H. Carpenter as solicitor for the Milwaukee & Minnesota Railroad Company, and Levi Hubbell as solicitor for Charles Howard, assignee for Sebre Howard, for the reason that an attorney merely employed to continue a case has no right to make any such stipulation to bind his client, and insist that it must be proven that Judge Hubbell, acting as attorney for Charles Howard, had right or authority to make said stipulation.

175 Motion denied. To which said ruling said plaintiff by his said counsel did then and there except.

Thereupon the said defendant rested his case.

The plaintiff, by way of rebutting testimony, called as a witness JOHN W. CARY, who being sworn, said:

That the name and style of his law-firm was "Cary & Pratt;" that such was the name and style of the firm on the 27th day of July, 1864; that on said day the said firm of Cary & Pratt were one of the attorneys of the Milwaukee and St. Paul Railway Company; that as such attorneys they signed a summons in the case of the Milwaukee & St. Paul Railroad Company against the La Crosse & Milwaukee Railroad Company, William Barnes, the Milwaukee & Minnesota Railroad Company, and others; that a suit under that title was commenced.

Ques. Was that suit commenced at the request of the officers of the St. Paul Railroad?

Ans. I presume it was commenced by their request or their direction. I do not know whether I advised it first or they, but it was an authorized proceeding, and was commenced for and on behalf of the Mil. & St. Paul Railroad Company; that company was the only and sole and exclusive party plaintiff in the cause.

Said plaintiff by his said counsel did now offer in connection
176 with said testimony of said John W. Cary a certified copy of the complaint in that suit, filed in the circuit court of Milwaukee County. Summons was issued on the 27th day of July, 1864, and was served on the La Crosse Road by delivering a copy of the summons to Daniel Wells, jr., president of the said Railroad Company, and leaving the same in his possession.

Said complaint was offered, first, by way of an estoppel, and second, as the sworn declaration in a proceeding in court of the officers of the St. Paul Railway Co., and as evidence of the facts stated in said complaint.

The defendants' counsel objected to the introduction of said record and also to all the other records of suits offered by the plaintiff in rebuttal of defendants' case, as immaterial and wholly foreign to the issue involved, and stated as follows: I wish to state that in that case a demurrer was interposed to the complaint, and the court decided they had no jurisdiction over the subject matter. An appeal was taken from the order sustaining the demurrer to the supreme court of the State of Wisconsin, and the order was affirmed. If I recollect rightly, that suit was this: The Milwaukee and St. Paul Railroad Company held certain
bonds under the Barnes mortgage. They were inclined to try the
177 question of the validity of the foreclosure of that mortgage. They commenced a proceeding for that purpose, and it had the end that I have stated, that the court held they had no jurisdiction of the subject matter, and that was affirmed by the supreme court. The Supreme Court of the United States afterwards, as your honor has said, decided that the Milwaukee and Minnesota Railroad Company was the owner of the equity of redemption. This litigation in the United States court proceeded upon the basis that the Minnesota Railroad Company was the owner of the equity of redemption. Our view as set forth in this suit in the State court was not sustained, and has never been sustained, and all there is of that is simply that we had certain bonds under the Barnes mortgage, and we took a certain view of that question, and it was not sustained, but, on the contrary, the court held the reverse; we were beaten, and the gentleman now offers that as an estoppel upon us

although the courts have absolutely decided that the Mil. & Minnesota Railroad Company was a legal organization and was the owner of the equity of redemption.

Said complaint was read in evidence, and is as follows:

178 Circuit court, Milwaukee County.

MILWAUKEE & ST. PAUL RAILWAY COMPANY *against* LA CROSSE & MILWAUKEE RAILROAD COMPANY, William Barnes, Milwaukee & Minnesota Railroad Company, Lawrence G. Graham, Donald D. Scott, Augustus Treadwell, Edwin Townsend, Henry L. Palmer, Ephraim Mariner, John Sercomb, Sebastian Knetzger, Frederick Lind, Newcomb Cleveland, Byron Kilbourn, George W. Chapman, Charles Zinn, John H. Tesch, DeWitt C. Freeman, James Wolstenholm, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, Edwin C. Litchfield, Theodric R. B. Eldridge, William Gemmell, Charlotte A. Quentin, August Sauthof; Ann Higgs Turton, executrix of the last will and testament of Thomas Turton, deceased; E. Bradford Greenleaf, Rodger Rogers, William Bump, and Sarah J. Harvey.

The plaintiff by Cary & Pratt, its attorneys, shows to this court:

That said plaintiff is a corporation duly authorized under and in pursuance of the laws of the State of Wisconsin.

That the La Crosse & Milwaukee Railroad Company is a cor-
179 poration duly organized under and by virtue of the laws of the State of Wisconsin.

That the Milwaukee & Minnesota Railroad Company claims to be a corporation organized under and by virtue of the laws of the State of Wisconsin.

That about the 21st day of June, A. D. 1858, the said La Crosse & Milwaukee Railroad Company was indebted to a large amount of floating debt accumulated for rolling-stock and materials furnished and provided and labor performed for said company, which was unsecured upon the railroad or other property of said company, and that a large numbers of farmers along the line of said company's railroad had before then loaned their credit in form of bonds and mortgages to aid said company in the construction and equipment of its said railroad, which bonds and mortgages had been before then used by said company, with a stipulation on its part with and to said farmers to pay the interest that might accrue thereon, and that a lare sum of said interest which said company was bound to pay as aforesaid had become due, and the said company was unable to pay the same, and proceedings were threatened against such farmers to enforce payment of such interest, and that the said company for the purpose of securing said indebtedness and said interest, and for other legitimate and necessary pur-
180 poses, did, on or about the day and year last aforesaid, make, sign, seal, execute, and perfect, ready to be negotiated, sold, delivered, and transferred in payment of said indebtedness of said company, and in payment of said interest, and to be used in and about the

necessary and proper business of said company, one thousand bonds of one thousand dollars each, and fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, all dated that day and year, and payable in A. D. 1888, with interest at seven per cent. payable semi-annually on the 1st day of January and July in each year, with coupons for said interest to said bonds respectively attached, which said bonds were in the form and to the effect mentioned in the trust deed to William Barnes hereinafter named.

And to secure the payment of said bonds and thereby enable said company to use said bonds for the purposes aforesaid, the said company did, on the said 21st day of June, 1858, make, execute, sign, acknowledge, and perfect its mortgage or deed of trust in due form of law, and as it by law had authority to do, to William Barnes, to secure the payment of said last-named bonds and the interest thereon, in and by which said mortgage or deed of trust said company mortgaged to said Barnes, trustee, for the purposes aforesaid, "all and singular the railroad of said company, commencing in the city of Milwaukee, and running from
181 thence to La Crosse, a distance of about two hundred miles, a part of which road had been constructed and was then in full operation, and the residue was then in process of construction, including all and singular the several tracts, pieces, or parcels of land which then were or thereafter might be or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which then constituted, or might thereafter constitute or be a part of, or appertain to said railroad, whether then made or to be made thereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroad, whether then made or built, or to be built and made thereafter, and all and singular the locomotive-engines and other rolling-stock, and all the other equipments of every kind and description which had then been or might thereafter be procured for or used on said railroad, and all the materials, tools, implements, utensils, and other personal property which had then been or might thereafter be procured for or used in connection with such railroad, and also all and singular the rights, liberties, privileges, and franchises of said railroad to La Crosse, together with other property and things in said mortgage described"; and that about the said 21st day of June, A. D. 1858, said mortgage was by said company duly and legally
182 delivered to said William Barnes, trustee, and was by said trustee thereafter caused to be duly and legally recorded in the office of the secretary of state of the State of Wisconsin, and, as the plaintiff says on information and belief, in the offices of the registers of deeds in the several counties through which said railroad passes and was then located.

That on the 11th day of August, A. D. 1858, the said company made, signed, sealed, and delivered to said Barnes, trustee, a certain indenture of supplemental mortgage or deed of trust, in and by which said company recited and affirmed the terms and conditions of said mortgage or deed of trust hereinbefore set forth, and dated June 21st, 1858, and did convey to said Barnes, as trustee as aforesaid, in addition to the things in said first mortgage conveyed, the following, that is to say, all and singular the rights, privileges, liberties, and franchises of said company of every kind and description, and also all lands granted or intended to be granted to said company, under and by virtue of the act of Congress and the act of the legislature of the State of Wisconsin in said supplementary mortgage mentioned, and also all the hereditaments and ap-

purtenances belonging or in anywise appertaining to the lands and real estate therein conveyed or intended to be conveyed, and also all and singular the stock, railroad, or other bonds, bills of exchange,
183 promissory notes, accounts, causes of action, demands and choses in action, of whatever nature, which might be owned or in which said company might have an interest, on such day as such company might first make default in the payment of the interest or principal, or any part thereof, which might thereafter become due on any of the said bonds issued or to be issued by said company, and to secure which mortgage was given. That immediately thereafter the said Barnes caused said supplementary mortgage to be recorded in the same offices as the first named deed of trust or mortgage to said Barnes was recorded, as hereinbefore set forth, a copy of which said first mortgage or deed of trust and a copy of which said supplementary mortgage or deed of trust to said Barnes are attached hereto, and marked respectively Exhibit No. 1 and Exhibit No. 2.

That immediately after the making and recording of said mortgage and supplemental mortgage said La Crosse & Milwaukee Railroad Company commenced to deliver the said bonds so secured as aforesaid, in payment of the indebtedness of said company and for the other purposes contemplated by said company in the issue thereof, and in the necessary and proper business of said company, and that a large portion of said bonds, amounting in the aggregate to about $1,300,000, were so sold and delivered in payment and transferred by said company for
184 the purposes and in the manner contemplated as aforesaid, and in other ways by said company. And that a large number of said bonds passed into circulation in the bond and stock markets of the United States, particularly in the city of New York, which are now held by bona-fide purchasers and owners thereof.

That of the bonds so issued and put in circulation by said La Crosse & Milwaukee Railroad Company, and secured by said trust deed so given to said William Barnes, the said plaintiff is now the lawful holder and owner of sixty-two bonds, amounting in the aggregate, exclusive of interest, to the sum of thirty-seven thousand four hundred dollars, and numbered as follows, to wit, number 65, 66, 67, 70, 71, 101, 136, 137, and 161, of one hundred dollars each; numbers 248, 249, 226, 227, 228, 229, 259, 260, 261, 262, 264, 601, and 602, and from number 501 to 520, both inclusive, of five hundred dollars each; and numbers 34, 35, 36, 37, 38, 344, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 601, 602, 603, and 604, of one thousand dollars each.

That the said La Crosse & Milwaukee Railroad Company made default in the payment of the coupons attached to said bonds, which became due on the 1st day of January, 1859, and that said coupons, together with all the other coupons of said bonds, are wholly unpaid, and that no interest on said bonds or any of said coupons have ever been
185 paid, and that twelve of said coupons are now due and unpaid, making the amount of interest now due and unpaid on said sixty-two bonds the sum of fifteen thousand seven hundred and eight dollars.

That said William Barnes resides at Albany, in the State of New York; that said plaintiff has notified him that it was the holder and owner of said sixty-two bonds, and that said La Crosse and Milwaukee Railroad Company had made default in the payment of the interest due on said bonds; that the coupons thereto attached were due and unpaid as aforesaid, and requested him to proceed and foreclose said mortgage or deed of trust for the use and benefit of the holders of said bonds

and to pay over to this plaintiff on such foreclosure their proper proportion of the proceeds arising from the foreclosure thereof; and at the time of making said request this plaintiff offered to said William Barnes to indemnify him against all loss for all proper and legal expenses attending said foreclosure; that said William Barnes has neglected and refused and still does neglect and refuse to take any steps to foreclose said mortgage, and has not commenced and, as this plaintiff is informed and believes, does not intend to commence any proceedings to foreclose said mortgage or deed of trust, or in any way to enforce said security for the payment of said bonds.

186 That, as this plaintiff is informed and believes, said William Barnes gives out and pretends that said mortgage or trust deed has been foreclosed by him, and that said mortgaged premises were by him, said William Barnes, sold at the court-house in the city of Milwaukee, on the twenty-first day of May, 1859, under and in pursuance of the power granted in said mortgage or trust deed, and that he became the purchaser thereof, for the benefit of the bondholders secured thereby, at the sum of one million five hundred and ninety-three thousand three hundred and thirty-three dollars and thirty-three cents; and that afterwards, and on or about the 23rd day of May, 1859, the owners and holders of a portion of the bonds secured by said mortgage or trust deed proceeded to organize a railroad company, elected directors, and took the corporate name of the Milwaukee & Minnesota Railroad Company, and that he, said William Barnes, then conveyed to said pretended Milwaukee & Minnesota Railroad Company all the mortgaged premises so as aforesaid purchased by him, and from thence hitherto said Milwaukee & Minnesota Railroad Company have assumed to be and act as a railroad company, and to have succeeded to the property, rights, and franchises of the La Crosse and Milwaukee Railroad Company.

187 But this plaintiff, on information and belief, shows that said pretended foreclosure was irregular and of no effect or validity; that said sale and purchase by said William Barnes was without authority, and that the amount of said bid was never paid by him or for him. That the said pretended organization of said Milwaukee and Minnesota Railroad Company was unauthorized and without force or effect, and that the title to said mortgaged premises did not pass to said William Barnes by virtue of said foreclosure and sale, nor to said Milwaukee & Minnesota Railroad Company by virtue of said foreclosure and sale and conveyance by said William Barnes, but that the title thereof still remains in said La Crosse and Milwaukee Railroad Company, and that said last named company is still the owner of the equity of redemption of said mortgaged premises, notwithstanding said pretended foreclosure and sale.

That the pretended sale of said mortgaged premises was not by virtue or in pursuance of a decree of any court, but that said William Barnes, trustee, assumed to make said sale by virtue of the power granted in said mortgage or deed of trust; that at the time said sale was made but about $1,300,000 in amount of said $2,000,000 of bonds purporting to be secured thereby had ever been issued or put in circulation by said La Crosse & Milwaukee Railroad Company, and that only about said sum of $1,300,000 of said bonds was ever issued or put in

188 circulation, or were outstanding at any time, secured by said mortgage or trust deed, but that the advertisement of said William Barnes, trustee, published by him, and in pursuance of which said sale was made, stated that the amount of bonds outstanding and secured

purtenances belonging or in anywise appertaining to the lands and real estate therein conveyed or intended to be conveyed, and also all and singular the stock, railroad, or other bonds, bills of exchange,
183 promissory notes, accounts, causes of action, demands and choses in action, of whatever nature, which might be owned or in which said company might have an interest, on such day as such company might first make default in the payment of the interest or principal, or any part thereof, which might thereafter become due on any of the said bonds issued or to be issued by said company, and to secure which mortgage was given. That immediately thereafter the said Barnes caused said supplementary mortgage to be recorded in the same offices as the first named deed of trust or mortgage to said Barnes was recorded, as hereinbefore set forth, a copy of which said first mortgage or deed of trust and a copy of which said supplementary mortgage or deed of trust to said Barnes are attached hereto, and marked respectively Exhibit No. 1 and Exhibit No. 2.

That immediately after the making and recording of said mortgage and supplemental mortgage said La Crosse & Milwaukee Railroad Company commenced to deliver the said bonds so secured as aforesaid, in payment of the indebtedness of said company and for the other purposes contemplated by said company in the issue thereof, and in the necessary and proper business of said company, and that a large portion of said bonds, amounting in the aggregate to about $1,300,000, were so sold and delivered in payment and transferred by said company for
184 the purposes and in the manner contemplated as aforesaid, and in other ways by said company. And that a large number of said bonds passed into circulation in the bond and stock markets of the United States, particularly in the city of New York, which are now held by bona-fide purchasers and owners thereof.

That of the bonds so issued and put in circulation by said La Crosse & Milwaukee Railroad Company, and secured by said trust deed so given to said William Barnes, the said plaintiff is now the lawful holder and owner of sixty-two bonds, amounting in the aggregate, exclusive of interest, to the sum of thirty-seven thousand four hundred dollars, and numbered as follows, to wit, number 65, 66, 67, 70, 71, 101, 136, 137, and 161, of one hundred dollars each; numbers 248, 249, 226, 227, 228, 229, 259, 260, 261, 262, 264, 601, and 602, and from number 501 to 520, both inclusive, of five hundred dollars each; and numbers 34, 35, 36, 37, 38, 344, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 601, 602, 603, and 604, of one thousand dollars each.

That the said La Crosse & Milwaukee Railroad Company made default in the payment of the coupons attached to said bonds, which became due on the 1st day of January, 1859, and that said coupons, together with all the other coupons of said bonds, are wholly unpaid, and that no interest on said bonds or any of said coupons have ever been
185 paid, and that twelve of said coupons are now due and unpaid, making the amount of interest now due and unpaid on said sixty-two bonds the sum of fifteen thousand seven hundred and eight dollars.

That said William Barnes resides at Albany, in the State of New York; that said plaintiff has notified him that it was the holder and owner of said sixty-two bonds, and that said La Crosse and Milwaukee Railroad Company had made default in the payment of the interest due on said bonds; that the coupons thereto attached were due and unpaid as aforesaid, and requested him to proceed and foreclose said mortgage or deed of trust for the use and benefit of the holders of said bonds

and to pay over to this plaintiff on such foreclosure their proper proportion of the proceeds arising from the foreclosure thereof; and at the time of making said request this plaintiff offered to said William Barnes to indemnify him against all loss for all proper and legal expenses attending said foreclosure; that said William Barnes has neglected and refused and still does neglect and refuse to take any steps to foreclose said mortgage, and has not commenced and, as this plaintiff is informed and believes, does not intend to commence any proceedings to foreclose said mortgage or deed of trust, or in any way to enforce said security for the payment of said bonds.

186 That, as this plaintiff is informed and believes, said William Barnes gives out and pretends that said mortgage or trust deed has been foreclosed by him, and that said mortgaged premises were by him, said William Barnes, sold at the court-house in the city of Milwaukee, on the twenty-first day of May, 1859, under and in pursuance of the power granted in said mortgage or trust deed, and that he became the purchaser thereof, for the benefit of the bondholders secured thereby, at the sum of one million five hundred and ninety-three thousand three hundred and thirty-three dollars and thirty-three cents; and that afterwards, and on or about the 23rd day of May, 1859, the owners and holders of a portion of the bonds secured by said mortgage or trust deed proceeded to organize a railroad company, elected directors, and took the corporate name of the Milwaukee & Minnesota Railroad Company, and that he, said William Barnes, then conveyed to said pretended Milwaukee & Minnesota Railroad Company all the mortgaged premises so as aforesaid purchased by him, and from thence hitherto said Milwaukee & Minnesota Railroad Company have assumed to be and act as a railroad company, and to have succeeded to the property, rights, and franchises of the La Crosse and Milwaukee Railroad Company.

187 But this plaintiff, on information and belief, shows that said pretended foreclosure was irregular and of no effect or validity; that said sale and purchase by said William Barnes was without authority, and that the amount of said bid was never paid by him or for him. That the said pretended organization of said Milwaukee and Minnesota Railroad Company was unauthorized and without force or effect, and that the title to said mortgaged premises did not pass to said William Barnes by virtue of said foreclosure and sale, nor to said Milwaukee & Minnesota Railroad Company by virtue of said foreclosure and sale and conveyance by said William Barnes, but that the title thereof still remains in said La Crosse and Milwaukee Railroad Company, and that said last named company is still the owner of the equity of redemption of said mortgaged premises, notwithstanding said pretended foreclosure and sale.

That the pretended sale of said mortgaged premises was not by virtue or in pursuance of a decree of any court, but that said William Barnes, trustee, assumed to make said sale by virtue of the power granted in said mortgage or deed of trust; that at the time said sale was made but about $1,300,000 in amount of said $2,000,000 of bonds purporting to be secured thereby had ever been issued or put in circulation by said La Crosse & Milwaukee Railroad Company, and that only about said sum of $1,300,000 of said bonds was ever issued or put in

188 circulation, or were outstanding at any time, secured by said mortgage or trust deed, but that the advertisement of said William Barnes, trustee, published by him, and in pursuance of which said sale was made, stated that the amount of bonds outstanding and secured

thereby was $2,000,000 of principal, and that the interest due thereon, and on which default was made on the first day of January, 1859, was the sum of about $70,000, when in truth and in fact there was only the sum of about $1,300,000 of principal outstanding and secured thereby, and only the sum of about $45,500 was past due and unpaid for interest on said bonds.

That said William Barnes, trustee, was not authorized in and by said deed of trust or mortgage, or by the supplemental deed or mortgage, to bid in said mortgaged premises for the benefit of the bondholders secured thereby. That there was no law of the State of Wisconsin in force when said mortgage or deed of trust was executed, or said bonds issued and put in circulation by said La Crosse & Milwaukee Railroad Company, authorizing him so to do. And that he never was authorized by only a few of said bondholders so to bid; and that his pretended purchase for the benefit of said bondholders was wholly unauthorized and of no binding force or validity whatever upon said bond-
189 holders except those so authorizing him.

That the said William Barnes never paid the amount of his said bid, or any part or portion thereof, and that the same never has been paid, and that the said plaintiff has never received anything on the bonds so held by it in consequence of said pretended sale, and that nothing has ever been paid by said William Barnes, or any one for him, to apply on said bonds on account of said pretended sale, and that the holders and owners of said bonds so now owned and held by this plaintiff never authorized said William Barnes to bid in said mortgaged premises for the benefit of said bonds or the holders thereof, and never in any way ratified or assented to said sale and said purchase by him.

That Lawrence G. Graham, Donald D. Scott, Augustus Treadwell, Edwin Townsend, Henry L. Palmer, Ephraim Mariner, John Sercomb, Sebastian Knetzger, Frederick Lind, Newcomb Cleveland, Byron Kilbourn, George W. Chapman, Charles Zinn, John H. Tesch, De Witt C. Freeman, James Wolstenholm, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, Edwin C. Litchfield, Theodric R. B. Eldridge, William Gemmell, Charlotte A. Quentin, August Southoff; Ann Higgs Turton, executrix of the last will and testament of Thomas Turton, deceased; E. Bradford Greenleaf, Rodger Rogers,
190 William Bump, and Sarah J. Harvey, defendants, have or claim some interest in said mortgaged premises subsequent to the lien of said trust deed or mortgage.

That on the 31st day of December, 1856, the said La Crosse & Milwaukee Railroad Company made and executed a mortgage or deed of trust to Greene C. Bronson, James T. Soutter, & Shepherd Knapp, as trustees, on all that part of said mortgaged premises described in the mortgage or deed of trust so as aforesaid made to William Barnes, lying west of Portage City, to secure the payment of $4,000,000 in amount of bonds, which amount of bonds were issued by said company under said mortgage or deed of trust; that said mortgage or deed of trust so given to said Bronson, Soutter, and Knapp was a lien on said premises prior and superior to the lien created by said mortgage or deed of trust so as aforesaid given to said William Barnes.

That said La Crosse & Milwaukee Railroad Company made default in the payment of interest due on the bonds secured by said mortgage or deed of trust so given to said Bronson, Soutter, & Knapp, and that on the 5th day of December, 1859, said Bronson, Soutter, & Knapp filed their bill to foreclose said mortgage or deed of trust so given to them, in the district court of the United States for the district of Wisconsin,

against said La Crosse and Milwaukee Railroad Company and
191 others, and that such proceedings were therein had, that on the 13th day of January, 1862, a decree of foreclosure and sale was entered therein; and afterwards, and on the 25th day of April, 1863, the marshal of the district of Wisconsin, under and by virtue of said decree, sold the premises therein described, being the premises described in the mortgage or deed of trust so as aforesaid executed to said Bronson, Soutter, & Knapp; and afterwards, and on the 7th day of May, 1863, said sale was duly confirmed by said district court whereby said plaintiff and all other persons claiming under said mortgage or deed of trust so executed to said William Barnes were barred and foreclosed of all lien and right or equity of redemption in all that part of said mortgaged premises lying west of Portage City.

And said plaintiff further says that no proceedings have been had at law or equity, other than as hereinbefore mentioned, to recover the amount due on said bonds so held by this plaintiff.

And said plaintiff further says that said La Crosse & Milwaukee Railroad Company is utterly and hopelessly insolvent, and that on the 11th day of June, 1860, Hans Crocker took possession of the rail, road of said company, together with its rolling stock and equipment and all the other property of said company, as receiver, to which office he was duly appointed by the district court of the Unithd States
192 for the district of Wisconsin, in equity, and that as such receiver and in virtue of his appointment he still holds possession of all of said road, rolling-stock, and property, except that portion so as aforesaid sold by the marshal of the district of Wisconsin, under the decree of said district court.

That the said mortgaged property and premises, subject to prior incumbrances, are wholly inadequate to the payment of said bonds secured by said mortgage so as aforesaid given to said William Barnes.

That this plaintiff brings this action for the benefit of itself and all other bondholders under said trust deed or mortgage who may choose to come in and make themselves parties thereto.

The said plaintiff therefore demands the judgment of this honorable court, as follows:

That the amount due this plaintiff, as well as all other bondholders under said mortgage or deed of trust to said William Barnes, be ascertained and determined; that said mortgage or deed of trust be foreclosed, and the premises therein described be sold by and under the direction of this court; that out of the moneys arising on said sale said bondholders be paid the amount due them for principal and interest on their said bonds, if the same be sufficient to pay the same, and if not, that each one be paid in proportion to the amount so found due, and that the residue of said money, if any, be brought into court to abide the further order of the court therein; that the purchaser at
193 said sale be let into the possession of said mortgaged premises, and that said defendants, and all persons claiming by, through, or under them or either of them, be forever barred and foreclosed of and from all right or equity of redemption of, in, and to said mortgaged premises and every part and parcel thereof.

That the said pretended foreclosure so as aforesaid made by said William Barnes, together with the said pretended sale made by and to him, and the conveyance from him to said Milwaukee and Minnesota Railroad Company be set aside, vacated, and annulled, and that it be adjudged that the said pretended Milwaukee & Minnesota Railroad Company is not the owner of the equity of redemption in said mort-

gaged premises, and that it has no right or title thereto. And that a receiver of said mortgaged property and premises may be appointed by this honorable court, with all the powers and authority of such officer, and that he may take possession of said mortgaged property, and operate, manage, and control said road under the direction of this court, and receive the revenue, income, and tolls thereof during the pendency of this action, and for such further relief and for such other relief as to this honorable court may seem meet and agreeable to equity.

CARY & PRATT,
Plaintiff's Attorneys.

194 STATE OF WISCONSIN,
County of Milwaukee, ss:

Alonson Cary, being duly sworn, deposes and says that he is one of the officers of the plaintiff in this action to wit, its secretary; that the foregoing complaint is true to his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

ALONSON CARY.

Sworn to before me this 27th day of July, 1864.

ALFRED L. CARY,
Notary Public Milwaukee Co., Wis.

Exhibit No. 1.—Trust deed.

This indenture, made the twenty-first day of June, in the year of our Lord eighteen hundred and fifty-eight, between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and William Barnes, of the city of Albany and State of New York, trustee as hereinafter mentioned, party of the second part.

Whereas the said railroad company, for the purpose of providing for and securing the payment of its floating debt, and for other purposes, has determined to issue its bonds for a sum not exceeding two
195 millions of dollars in the aggregate, embracing one thousand bonds of one thousand dollars each, fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, with interest warrants in the usual form attached, and which bonds will be substantially in the following form, to wit:

UNITED STATES OF AMERICA,
State of Wisconsin:

No. .] [$.

Know all men by these presents that the La Crosse & Milwaukee Railroad Company, for value received, acknowledges itself indebted to the bearer thereof in the sum of dollars, which sum it agrees to pay to the bearer hereof on the first day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at the Albany Exchange Bank, in the city of Albany, with interest at the rate of seven per cent. per annum, payable at the Albany Exchange Bank, in the city of Albany, semi-annually, on the first day of January and the first day of July in each year, on presentation or delivery of the interest warrants or coupons hereto annexed.

This is one of a series of bonds, all of the same tenor, making in the aggregate the sum of two millions of dollars, for securing the payment of which a trust deed has been executed by said company to William

Barnes, of the city of Albany, and State of New York, conveying
196 to him (subject to certain charges thereon) the railroad of said company, commencing in the city of Milwaukee and running from thence to La Crosse, a distance of about two hundred miles, part of which road has been constructed and is now in full operation, and the residue is in process of construction, together with the equipments and all other things pertaining or which may hereafter pertain to the road so conveyed, reference to which deed is hereby had and made for a more full description of its contents.

And for further securing and providing for the payment of said bonds the said deed of trust provides for the creation of a sinking fund, the first payment of $25,000 to which is to be made by said company to William Barnes, of Albany, the trustee named in said deed of trust, on the first day of July, eighteen hundred and sixty-one, and thereafter a like sum annually, with which sum, as from time to time paid, the said trustee is to purchase outstanding bonds secured by said deed of trust, as is more particularly specified in said deed of trust, to which reference is hereby made.

In witness whereof said railroad company has hereunto affixed its corporate seal, and caused the same to be signed by the president and secretary, this 21st day of June, in the year of our Lord one thousand eight hundred and fifty-eight.

President.

Secretary.

Registered & countersigned this 185 .

Trustee.

197 And whereas said railroad company has determined to secure the payment of said bonds, with the interest thereon, in the manner herein provided:

Now, therefore, this indenture witnesseth that said railroad company, in consideration of the premises and the sum of one dollar paid by said party of the second part, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said party of the second part all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles, a part of which road has been constructed, and is now in full operation, and the residue is in process of construction, including all and singular the several tracts, pieces, or parcels of land which now are or hereafter may be or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute, or may hereafter constitute, or be a part of or appertain to said railroad, and also all a nd singular the superstructure of said railroad, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said
198 railroad, whether now built or made or to be built or made hereafter; and also all and singular the locomotive-engines and other rolling stock, and all the other equipments of every kind and description which have already been or may hereafter be procured for or used on said railroad, and all the materials, tools, implements, and utensils,

and other personal property which have been or may hereafter be procured for or used in connection with said railroad, and also all and singular the rights, liberties, and privileges and franchises, of said railroad company, so far as they relate to said railroad from Milwaukee to La Crosse.

And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said party of the second part all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has been already acquired, together with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroad from Milwaukee to La Crosse, as fully and amply as the same might be conveyed if said railroad had already been fully constructed and equipped, excepting, however, any lands which now do or hereafter may belong to said company under any grant from the United States or the State of Wisconsin; subject, nevertheless, to liens already existing upon the property and franchises above mentioned, as follows: To a first mortgage upon the eastern division of the said road, between Milwaukee and Portage City, to secure outstanding bonds of said company to the amount of about nine hundred and twenty-two thousand dollars; also bonds to the city of Milwaukee to the amount of three hundred and fourteen thousand dollars; also to bonds secured by second mortgages on said eastern division, subject to the amount of one million dollars; also subject to a mortgage of four million dollars upon the line of said road from Portage City to La Crosse, and to a second mortgage of about two hundred thousand dollars on the road from Portage City to La Crosse, and from the junction near the village of Tomah to the terminus of the road on the lakes or river St. Croix.

To have and to hold all and singular the property, real and personal, with the hereditaments and appurtenances, and all and singular the rights, liberties, and franchises hereby conveyed, or intended to be conveyed, subject to the aforesaid mortgages to the aforesaid party of the second part, and his successor and his heirs and assigns, forever, in trust, nevertheless, and upon the trusts, terms, and conditions herein expressed:

First. Until default shall be made in the payment of said bonds, or some of them, or the interest thereon, said railroad company shall be suffered and permitted to hold and enjoy the said railroad with all the equipments, and all other things appertaining to the same, and to use the same, and to take and receive the profits thereof to its own use in the same manner as though this deed had not been made.

Second. In case default for the space of fifteen days shall be made in the payment of any of said interest warrants or coupons, as they respectively fall due; or if default for the like period shall be made in the payment, at maturity, of the principal sum of money mentioned in any of the said bonds, then, and in either of said cases, it shall be lawful, and said trustee is hereby authorized in his discretion, either in person or by his attorney or attorneys, agent or agents, to enter into and upon, and take possession of all and singular the railroad, and all the other property, real and personal, hereinbefore conveyed or intended to be conveyed, and to take and receive the income and profits thereof, and to sell all and singular said railroad and other property, with all the rights, liberties, privileges and franchises of said railroad company, in respect to said railroad, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances, which shall vest in such purchaser or purchasers all the estate, right,

title and interest, whether legal or equitable, of said trustee and said railroad company of, in, or to said property, rights, liberties, privileges and franchises, and every part and parcel thereof.

201 But before any sale shall be made at auction, notice of such intended sale shall be published once in each week for three weeks at the least in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be required by the laws of the State of Wisconsin, the same shall be given.

And in case default shall at any time be made in the payment of the interest on the bonds then outstanding, or in case default shall be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then, and in either of said cases, said trustee, on the written request of the holder or holders of bonds then outstanding to the amount in the aggregate of one hundred thousand dollars, shall proceed to make such sales and conveyances so as above mentioned.

Third. Said railroad company covenants and agrees to and with said trustee, and his successor, that said company will, from time to time, during the continuance of the trust, make, execute, and cause to be duly recorded, and deliver to said trustee all such further conveyances and assurances, and will do all such further acts and things as m'y be either necessary or proper for more effectually vesting in said trustee all such right, title, interest or estate, both legal and equitable, as said railroad company now has or may hereafter acquire of, in, or to all and

202 every part of the property hereby conveyed, or intended to be conveyed, together with the rights, liberties, privileges and franchises aforesaid.

Fourth. Said railroad company will cause this indenture to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to the conveyance, and will pay and discharge all taxes, charges, liens and other burdens which either exist or may hereafter arise or be imposed upon the property hereby conveyed, or intended to be conveyed, and the trustee assumes no duty or responsibility on these subjects, or any of them, nor in relation to any other matter or thing, except as herein provided.

Fifth. This trust extends only to such bonds as shall be registered and countersigned by the trustee; and when all of said bonds shall be satisfied and discharged the trust shall cease. The trust shall also cease at the end of six calendar months after the principal moneys shall fall due as to all such bonds as shall not then have been presented for payment. And whenever the trust shall determine, and any moneys which may be due to the trustee shall be paid, the trustee will reconvey to said railroad company all this right, title and interest of, in and to the trust property.

Sixth. Said railroad company will, from time to time, pay all costs, charges, expenses and compensation of the trustee in, about, or

203 for the execution of the trust, and will in all things keep him fully indemnified and saved harmless of, from, and against all damages, costs, charges and expenses which he may sustain or be part' to in consequence of accepting this trust, or of anything which may be done or omitted under it, saving only such damages as may arise from the culpable act or neglect of the trustee.

Seventh. And the said railroad company agrees to establish and provide a sinking fund for the gradual redemption and payment of said bonds, and for that purpose will pay to the said trustee, on the first day

of July, eighteen hundred and sixty-one, and annually thereafter until this trust is closed, the sum of twenty-five thousand dollars. With such sum, as from time to time the same shall be paid, the said trustee shall from time to time purchase outstanding bonds, secured by this deed of trust, at the lowest price he can purchase the same for, first giving ten days' public notice in one or more newspapers published in New York, Albany and Milwaukee respectively, of his desire to purchase so many of said bonds as can be obtained for the money of said sinking fund then in his hands, and all bonds so purchased, belonging to said sinking fund, shall be retained by said trustee until this trust be closed.

Eighth. The trustee is hereby authorized to appoint all such
204 attorneys, counsellors, clerks and other agents as he may deem proper in the execution of the trusts, and shall not be answerable for the defaults or other misconduct of such attorneys, counsellors or other agents, unless chargeable with culpable negligence in their selection; nor shall the trustee be responsible for anything short of gross negligence or wilful default in the discharge of any of his duties.

Ninth. All moneys which may be received by the trustee under trust, after deducting therefrom all costs, counsel fees, charges, and other expenses of the trustee, and his compensation for executing the trust, shall be applied to the payment of the bonds which may be issued under the trust, and the surplus, if any, shall be paid to said railroad company.

Tenth. The supreme court of the State of New York may remove the trustee on the application of the railroad company, reasonable notice being first given to said trustee. The trustee may resign his trust, and be thenceforward discharged from all further duty or obligation in relation thereto, provided such resignation, after reasonable notice to the president or secretary of said railroad company, shall be approved by said supreme court; and on the death, removal, or resignation of a trustee, said supreme court may appoint a new trustee, who shall thereupon acquire and have all the right, title, interest, and authority under the trust, and be subject to all duties and responsibilities under the same, as fully as though he had been the original trustee and
205 had executed this deed.

Eleventh. Said trustee hereby accepts and covenants and agrees to and with said railroad company faithfully to execute said trust.

In witness whereof said railroad company has hereto affixed its corporate seal, and caused the same to be subscribed by its president and secretary, and the trustee has subscribed his name and affixed his seal the day and year first above written.

LA CROSSE & MILWAUKEE RAILROAD COMPANY.
[SEAL.] By N. P. STANTON, *President.*
LOCKWOOD L. DOTY,
Secretary of the La Crosse & Milwaukee Railroad Company.
WILLIAM BARNES, *Trustee.* [SEAL.]

Signed, sealed, executed and delivered in our presence as to the La Crosse & Milwaukee Railroad Company, by N. P. Stanton, president, and as to William Barnes, the said trustee.

CLARK, B.
J. C. CARY.

Signed, executed, and delivered in our presence as to Lockwood L. Doty, secretary of the La Crosse & Milwaukee Railroad Company.

EDWARD P. WHALING.
P. M. JOHNSON.

STATE OF NEW YORK,
County of Albany:

206 Be it remembered, that on this second day of July, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgement and proof of the execution of deeds and other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions to be used or recorded in the State of Wisconsin, appeared Nehemiah P. Stanton, described in and who executed the above instrument in writing, as the president of and in behalf of the La Crosse & Milwaukee Railroad Company, and acknowledged that he executed the said instrument as president as aforesaid, freely, for the purposes therein stated; and I certify that the said person who made the said acknowledgement is personally known to me to be the individual described in and who executed the said instrument.

And the said Nehemiah P. Stanton, being by me duly sworn, says that he is the president of the La Crosse & Milwaukee Railroad Company, the above named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

207 In testimony whereof, I have hereunto set my hand and seal official at my office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

[SEAL.] EDWARD WADE,
Commissioner of the State of Wisconsin in and for the State of New York.

STATE OF NEW YORK,
County of Albany, ss:

Be it remembered, that on the second day of July, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgement and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths and take and certify depositions, to be used or recorded in the said State of Wisconsin, appeared William Barnes, described in and who executed the above instrument of writing between him, as one of the parties thereto, and the La Crosse and Milwaukee Railroad Company, the other party thereto, and the said William Barnes acknowledged that he executed the said instrument freely for the purposes therein stated; and I

308 certify that the person who made the said acknowledgement is personally known to me to be the individual described in and who executed the said instrument.

In testimony whereof I have hereunto set my hand and seal offic ia at my office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

[SEAL.] EDWARD WADE,
Commissioner of the State of Wisconsin in and for the State of New York.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Be it remembered, that on this seventh day of July, eighteen hundred and fifty-eight, before me personally appeared Lockwood L. Doty, to me well and personally known to be the person described in and who executed the above instrument in writing as secretary of and in behalf of the La Crosse & Milwaukee Railroad Company, for the uses and purposes therein mentioned; and the said Lockwood L. Doty being by me duly sworn, says that he is the secretary of the La Crosse and Milwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the
209 said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof I have hereunto set my hand and affixed my notarial seal.

[SEAL.] E. MARINER,
Notary Public, Milwaukee County, Wisconsin.

Recorded July 8th, 1858, at 8 o'clock a. m.

Exhibit No. 2.

Indenture made the eleventh day of August, one thousand eight hundred and fifty-eight, between the La Crosse & Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and William Barnes, of the city of Albany and State of New York, trustee as hereinafter mentioned, and under and by virtue of an indenture made by and between said corporation and said Barnes on the twenty-first day of June, one thousand eight hundred and fifty-eight, party of the second part.

Whereas the Congress of the United States, by an act approved June 3rd, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," did enact as follows:

SECTION 1. Be it enacted by the Senate and House of Rep-
210 resentatives of the United States of America in Congress assembled, that there be and is hereby granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers, for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the line or rout's of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached as aforesaid, which land thus selected in lieu of those sold and which pre-emption has attached as aforesaid, together with the sections and parts of

sections, designated by odd numbers as aforesaid and appropriated as aforesaid, shall be held by the State of Wisconsin for the use
211 and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads; provided further, that the lands hereby granted shall be exclusively applied in the construction of the road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; and provided further, that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroad through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. And be it further enacted, that the sections and parts of sections of land which by such grant shall remain to the United States within six miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when solds, nor shall any of the said lands become subject to private entry until the same have been first offered at public sale at the increased price.

212 SEC. 3. And be it further enacted, That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other, and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charges upon the transportation of property or troops of the United States.

SEC. 4. And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road, respectively, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold; and so, from time to time, until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

SEC. 5. And be it further enacted, That the United States mail shall be transported over said road, under the direction of the Post-Office Department, at such price as Congress may by law direct. Provided,
That until such price is fixed by law, the Postmaster-General shall
213 have the power to determine the same. (Approved June 3rd, 1856.)

And whereas the legislature of the State of Wisconsin subsequently passed an act, approved October 11th, 1856, which is in the following words: "An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3rd, 1856":

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The La Crosse & Milwaukee Railroad Company is hereby

authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate railroads, with one or more tracks or lines, from the city of Madison, in the county of Dane, and from the village of Columbus, in the county of Columbia, on the most direct and feasible route, by the way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, and shall have, possess, exercise, and enjoy the same rights, privileges, functions, franchises, authority, and immunities with reference to the said routes, or any railroad to be built thereon, as it now possesses and enjoys with reference to any route it is now authorized to occupy,
214 or any railroad built or to be built thereon; and there is hereby conferred upon the La Crosse and Milwaukee Railroad Company all the power and authority contained in the charter of said company, and in the acts amendatory thereof, for the purpose of carrying out the objects of this act and of appropriating and applying the lands hereinafter in this act granted, or their proceeds, to aid in the construction of railroads by this act authorized to be built.

SEC. 2. The said roads shall be constructed on the most direct and feasible routes from Madison to Portage City, and from Columbus to Portage City, and simultaneously, as nearly as practicable, and both of them shall be completed by the last day of December, A. D. 1858. And for the purpose of estimating and selecting lands granted by Congress, the city of Madison is hereby designated as the point of commencement of said road, and the whole of the railroad hereby authorized to be constructed shall be constructed by said La Crosse & Milwaukee Railroad Company within ten years from the 3rd day of June, 1856.

SEC. 3. The said La Crosse & Milwaukee Railroad Company shall never set up the defence of usury to any contract in any court whatsoever; it may purchase and own rails, chairs, spikes, engines, tenders, cars, and all other things necessary and useful for the construction or operation of a railroad, and sell the same; and shall also have
215 power and authority to operate its said roads, or either of them, in connexion with any and all other railroads which may cross, come up to, or connect with the said railroads, or either of them, upon such terms as shall be mutually agreed upon by and between the said companies: Provided, however, that the said La Crosse & Milwaukee Railroad Company, in making any such contract as last aforesaid, shall give no preference to one company over any other such company or companies as last above mentioned, but all such companies shall be put upon the same equal terms: And provided also, that if the said La Crosse & Milwaukee Railroad Company, and such other railroad company as may desire a running connexion with the same, shall at any time not be able to agree upon the terms of such connexions, then and in that case either party may apply to the circuit court of the circuit in which such connexion may be sought, and the said circuit court shall appoint three commissioners, whose duty it shall be forthwith to proceed to examine and adjust the terms on which the said connexion shall exist, and the said award of terms of connexion shall be filed in the office of the secretary of state, and shall be binding on both parties for the term of two years. Such application shall be on not less than ten days' notice, in writing, to be given by the party making such application to the adverse party.

216 SEC. 4. For the purpose of aiding in the construction of the railroads which by this act the said La Crosse & Milwaukee

Railroad Company is authorized to construct, all the interest and estate, present or prospective, of this State in or to any and all the lands granted by the Government of the United States to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, by virtue of an act of Congress entitled "An act granting a portion of the public lands in the State of Wisconsin to aid in the construction of railroads," approved June 3rd, 1856, together with all and singular the rights, privileges, and immunities conferred, or intended to be conferred, by the said act of Congress, are hereby granted to the said La Crosse and Milwaukee Railroad Company: Provided, that the said land shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever: And provided further, That the title to said lands shall vest in the La Crosse and Milwaukee Railroad Company in the manner following, that is to say: whenever
217 twenty continuous miles of said road shall have been completed so as to admit of running regular trains on the same, the governor of this State shall certify to the Secretary of the Interior the fact that such twenty continuous miles of such road are completed as aforesaid, then the title to two hundred and forty sections of said lands shall vest in the La Crosse & Milwaukee Railroad Company; and when a second continuous twenty miles of said road shall have been completed so as to admit of running regular trains of cars on the same, the governor shall certify as before, and thereupon a further quantity of one hundred and twenty sections of said land shall vest in said company, and so from time to time until said roads are completed; and it shall be the duty of the governor so to certify to the Secretary of the Interior whenever such twenty miles are completed so as to admit of running regular trains of cars on the same; and the governor of the State shall, in his official capacity, and on behalf of the State, and under the great seal thereof, execute and deliver to the La Crosse & Milwaukee Railroad Company, whenever it shall by virtue of the provisions of this charter be entitled to any of said lands, a deed in fee-simple of any and all the lands to which said company shall be entitled: Provided, That said company shall not sell any of said lands until twenty miles of said
218 road shall be completed so as to admit of running regular trains over the same, and so on from time to time, so that the sales of lands by said company shall never exceed six sections of land for every mile of road so completed.

SEC. 5. The location and designation of the route and line of the said roads shall be made by the said La Crosse & Milwaukee Railroad Company, and the same shall, from time to time, and as fast as practicable, be reported to the governor of the State. The selection of lands provided for in the act of Congress hereinbefore mentioned shall be made by such agents as may be appointed by the governor of the State. Such selection, as well as the survey, location, and completion of said roads, and the compensation of such agents, shall be at the cost and charge of said company, without charge of any kind upon the treasury of the State of Wisconsin. Said railroads, which shall be constructed by the application of funds derived from the lands herein granted, shall be and remain public highways for the use of the Government of the United States, free from any toll or other charge upon the transportation of property or troops of the United States, and the United States mail

shall be transported over said roads under the direction of the Post-Office Department, as provided in said act of Congress.

SEC. 6. In consideration of the grants, privileges, and franchises herein conferred upon the said La Crosse & Milwaukee Railroad Com-
219 pany, for the purposes aforesaid, the said company shall, on or before the first day of March in each year, pay into the treasury of the State such sum as it is by the existing laws of the State required to pay in place of taxes upon its road now constructed, or which it may hereafter construct under the present charter; and in addition thereto it shall pay into the treasury of the State, on or before the first day of March in each year, four per centum on the gross earnings of said road to be built by said company in pursuance of the power and authority conferred by this act, for the year ending on the last day of the preceding December, in place of taxes on that portion of its said railroad so to be constructed; and for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this State on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstracts, full power is vested in the governor of this State, or any other person appointed, as may be by law prescribed, to examine the books and papers of said company, and to examine under oath the officers,
220 agents, and employees of the said company and other persons; and if any person so examined by the governor or other authorized person shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is hereby declared to have committed perjury; and for securing to the State the payment of the aforesaid per centum, it is hereby declared that the State shall have a lien upon the railroad of the said company, and upon all other property, estate, and effects of said company, whether real, personal, or mixed, and the lien hereby secured by the State shall take and have precedence of all demands, decrees, and judgments against the said company.

The first payment shall be made on the first day of March next, after fifty miles of said road shall be completed, and such payment shall be in lieu and in full of all claims of the State for the grant hereby made; and in consideration of such annual payment the said company shall be forever exempt from all assessments and taxes whatever by the State, or by any county, town, city, village, or other municipal authority in the State (except special taxes for the improvement of streets and sidewalks), upon all stock in the said La Crosse & Milwaukee Railroad Company, whether belonging to said company or to individuals, or any of its franchises or estate, real, personal, or mixed, held by said company, and necessary for the operation of said railroad; and said
221 lands, granted by said act of Congress, and hereby authorized to be conveyed to the La Crosse & Milwaukee Railroad Company, shall be exempt from taxation under and by virtue of the laws of this State for the period of ten years after the passage of this act, unless sooner sold, conveyed, or leased by the said La Crosse & Milwaukee Railroad Company; and the State shall have a prior lien upon the road of said company, and all the appurtenances and stock thereof, for all dues that may accrue to the State from said corporation, as herein provided, which lien of the State shall take precedence of all demands, judgments or decrees against said corporation.

SEC. 7. Within five years after the title of such lands shall become

vested in the said railroad company, the same, if any shall remain unsold, shall be offered for sale in limited quantities at fair prices, preference being given to actual settlers.

SEC. 8. The said La Crosse & Milwaukee Railroad Company shall have full power and authority to transport persons and property in boats, vessels, barges, or other water craft, on any navigable water which any portion of their railroad may run to or connect with, and to receive and collect reasonable compensation for the same, and for that purpose may purchase or build and own such vessels, boats, barges, and other water craft as it may require.

SEC. 9. The said La Crosse & Milwaukee Railroad Company
222 shall be capable in law of taking and holding any lands granted by the Government of the United States or of this State to aid in the construction of railroads, which shall be conveyed to said company by this act, or by deed, or by operation of law; and may also mortgage or pledge or otherwise dispose of all their right, title, claim, or demand of, in or to any lands or interest in lands granted to said company by this act, and in any other estate, real, personal, or mixed, of which they may be seized at the time of execution of such mortgage, or which they may acquire subsequent thereto, in such manner and on such terms as the directors may think proper.

SEC. 10. In case the La Crosse & Milwaukee Railroad Company shall construct the railroad which by this act it is authorized to construct, or any part of it, upon or over any route upon or over which any other railroad company is authorized to construct a railroad, and upon or over which it has, previous to the passage of this act, actually surveyed or located its line of railroad, it shall be the duty of the La Crosse & Milwaukee Railroad Company to settle with such railroad company, upon principles of justice and equity, for all its property and rights of property which the said La Crosse & Milwaukee Railroad Company shall take, injure, or destroy; and the latter company shall pay to any such company, whose property or rights of property shall be thus taken,
223 injured, or destroyed, whatever the same is reasonably worth, such payment to be made in money, bonds, stock or lands, or in such other manner as the said companies shall mutually agree. And if the said companies cannot mutually agree upon the amount of compensation to be made by the said La Crosse & Milwaukee Railroad Company to such other company for the property and rights of property which said La Crosse & Milwaukee Railroad Company shall so as aforesaid take, injure and destroy, then, and in that case, each of said companies shall select a disinterested engineer, and the two engineers so selected shall choose a third person, and in case they cannot agree upon such third person the governor shall appoint such third person; and the three persons so selected shall constitute a board of commissioners, whose duty it shall be to ascertain, determine, and award the amount of compensation which the said La Crosse & Milwaukee Railroad Company ought in justice and equity to make to such other railroad company for the property and rights of property which shall be so as aforesaid taken, injured or destroyed.

SEC. 11. This act, and all grants herein contained, shall cease and be void unless the said La Crosse & Milwaukee Railroad Company shall accept of the same within five days after the passage of this act; and such acceptance shall be by a resolution adopted by the directors of said company, a copy of which, duly certified by the secretary
224 of said company, under its corporate seal, within said period of five days from the passage of this act, shall be deposited in the

office of the secretary of state. And in case the said La Crosse & Milwaukee Railroad Company shall violate the provisions of this act the legislature may repeal this act and may revoke all and singular the rights and franchises herein conferred, so far as the same has not been performed and fulfilled, and so far as the rights and privileges hereby granted have not become complete and absolute.

SEC. 12. All the property which the said La Crosse & Milwaukee Railroad Company is authorized to appropriate, take, possess, hold, use, or enjoy, by making payment thereof as is in this act provided, is hereby declared to be taken for public use so soon as the said company shall so appropriate, take, possess, hold, or use the same.

SEC. 13. The capital stock of the La Crosse & Milwaukee Railroad Company is hereby increased two million dollars over and above its present capital, and within three months after the passage of this act said company shall open books for subscription to such increased capital stock, after giving at least thirty days' notice thereof in two newspapers, one published in the city of Milwaukee, and one published in the city of Madison. Such books shall be opened in the city of Milwaukee, and shall be kept open for not less than three days, and all per-
225 sons shall be permitted to subscribe to said stock on the payment to the treasurer of the company of five per cent. of the amount subscribed in cash; but no one person shall be allowed to subscribe for more than two hundred and fifty shares of such stock; and in case the number of shares subscribed shall exceed the amount of two million of dollars, the same shall be reduced to that amount by deducting such sums as may be necessary pro rata from each of the several subscriptions, and all of the shares of stock so subscribed shall be subject to calls for instalments thereon, in like manner as the other stock of said railroad company.

SEC. 14. It is hereby declared that, in the judgment of the legislature of this State, the objects of the corporation named in this act cannot be attained under or by general laws.

SEC. 15. The La Crosse & Milwaukee Railroad Company shall fence its road in parcels, as it shall from time to time operate the same, within one year after it shall commence the operating of any and every such parcel, until the whole of such railroad shall be, in a good, proper, and substantial manner, fenced throughout the entire extent thereof.

SEC. 16. This act is hereby declared to be a public act, and the same shall immediately after the passage thereof be printed by the
226 State printer, and when thus published, shall take effect and be in force.

And whereas the said railroad company, after the passing of the last mentioned act, and on the same day, duly accepted the same by a resolution adopted by the directors of said company, a copy of which, certified by the secretary of said company, under its corporate seal, was on the same day deposited in the office of the secretary of state.

And whereas the said railroad company, for the purpose of providing for and securing the payment of its floating debt, and for other purposes, had determined before the date of the indenture hereinafter mentioned, dated June 21st, 1858, between said company of the first part, and said Barnes as trustee of the second part, to issue its bonds for a sum not exceeding two millions of dollars in the aggregate, embrac ng one thousand bonds of one thousand dollars each, fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, with interest-warrants or coupons in the usual form attached.

And whereas, also, the La Crosse & Milwaukee Railroad Company executed and delivered to said party of the second part, an indenture, dated on the 21st day of June, A. D. 1858, recorded in the office
227 of the secretary of state of the State of Wisconsin, on the 8th day of July, A. D. 1858, in book of railroad mortgages, on pages 342, 343, 344, 345, 346, 347, 348, by which the said railroad company conveyed to said William Barnes, party of the second part, as trustee for the holders of said bonds as therein particularly specified, all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles, including all and singular the several tracts, pieces or parcels of land which constituted or might thereafter constitute the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all other lands which might thereafter constitute or be a part of or appertain to said railroad, and also other property, real and personal, and other rights, privileges, liberties, and franchises, as by reference thereto will more fully and at large appear.

And whereas, also, the said indenture contained a covenant and agreement on the part of the said La Crosse & Milwaukee Railroad Company to make, execute, and deliver to said William Barnes, as trustee as aforesaid, all necessary and proper further conveyances and assurances.

And whereas the said trustee has required the execution and delivery of this further conveyance.

228 Now, therefore, this indenture witnesseth, that the said La Crosse & Milwaukee Railroad Company, in consideration of the premises and of the mutual promises herein contained, and the sum of one dollar paid by the said party of the second part to said party of the first part, the receipt of which is hereby confessed and acknowledged, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm unto said party of the second part, all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles.

And also the railroad of said company, commencing in the village of Madison, and running from thence by way of Portage City to the St. Croix River or lake, a distance of about two hundred and sixty-eight (268) miles.

And also the railroad of said company, commencing in the village of Columbus, and running from thence to Portage City, a distance of about forty (40) miles, a part of which roads have been constructed and are now in full operation, and the residue are in process of construction; and all other railroads built or to be built and constructed by said company, or which they have a right to construct by or under any corperate or other rights, privileges, or franchises, hereto-
229 fore granted or given, or which may be hereafter granted or given to said La Crosse and Milwaukee R. R. Co. by the legislature of the State of Wisconsin, or from any other source, or in any other manner whatsoever, including all and singular the several tracts, pieces or parcels of land which now are or hereafter may be or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all other lands and real estate which now constitute or may hereafter constitute, or be a part of, or appertain to said railroads, and including, also, all and singular the lots, lands and real estate whatsoever which the said railroad company now own, or which they shall hereafter acquire by purchase, grant, gift, or otherwise, in

the cities of Milwaukee & La Crosse, or in the vicinity of either of said cities, and all improvements made or to be made thereon, and all rights of dockage and wharfage, and all other riparian rights, privileges, and franchises appertaining thereto; for a particular description of which lands already acquired, reference is made to the various deeds of the same to the said company.

And also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, whether now built or made, or
230 to be built or made hereafter.

And also all and singular the locomotive-engines and other rolling stock, and all the other equipments of every kind and description, which have already been or may hereafter be procured for or used on said railroads, and all the materials, tools, implements, and utensils and other personal property, which have or may hereafter be procured for or used in connexion with said railroads.

And also all and singular the rights, privileges, liberties, and franchises of said La Crosse & Milwaukee Railroad Company, of every kind and description.

And also, the said La Crosse & Milwaukee Railroad Company has granted, bargained, sold, conveyed and confirmed, and does by these presents grant, bargain, sell, convey and confirm unto said party of the second part, all and singular the lands granted, or intended to be granted, to said railroad company under or by virtue of the act of Congress and the act of the legislature of the State of Wisconsin hereinbefore mentioned, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed.

And also all and singular the stock, railroad or other bonds, bills of exchange, promissory notes, accounts, causes of action, demands and choses in action of whatever nature, which may be owned,
231 or in which the said railroad company may have an interest, on such day as the said railroad company may first make default in the payment of the interest or principal or any part thereof, which may hereafter become due on any of the said bonds issued or to be issued by said company.

And it is hereby declared to be the intention of the parties to these presents, to convey to and vest in said party of the second part, all the property, real and personal and mixed, of said railroad company, to be acquired or vested hereafter, as well as that which has been already acquired or vested, together with all the rights, liberties, privileges and franchises of said railroad company, as fully and amply as the same might be conveyed if said railroads had already been fully built, constructed and equipped, and the particular lands granted by the foregoing acts of Congress and the said legislature had already been fully designated and duly conveyed and duly patented to said railroad company according to the provisions of said acts.

And the said La Crosse & Milwaukee Railroad Company, party of the first part, does hereby covenant, grant, bargain, promise and agree, to and with the said party of the second part, and his successors, grantees and assigns, to warrant and forever defend the above described and granted premises, lands, tenements, and every part and
232 parcel thereof, and also all the property, real, personal and mixed, now vested or acquired, or hereafter to be vested or acquired, and also all the rights, property, real, personal and mixed, choses

in action, privileges and franchises above conveyed, or intended to be conveyed, unto the said party of the second part, his successors, grantees or assigns, against the said party of the first part, and against all and every other person or persons, States or corporations, lawfully claiming or to claim the same or any part thereof, subject, nevertheless, to all legal liens, already existing upon the property and franchises above mentioned.

To have and to hold all and singular the said property, real, personal, and mixed, and choses in action, with the hereditaments and appurtenances, and all and singular the rights, liberties, privileges, and franchises, hereby conveyed or intended to be conveyed, subject to the aforesaid existing legal liens, to the aforesaid party of the second part and his successors and heirs and asssigns forever.

In trust, nevertheless, and upon the trusts, terms, and conditions herein expressed and also expressed in the said indenture made and executed by and between the said parties on the 21st day of June, A. D. 1858.

233 First. Until default shall be made in the payment of said bonds, or some of them, or in the payment of the interest thereon, or some part thereof; and the said railroad company shall be suffered and permitted to hold and enjoy said railroads, with all the equipments and all other things appertaining to the same, and to use the same and to take and receive the profits thereof to its own use in the same manner as though this deed had not been made.

Second. In case default for the space of fifteen days shall be made in the payment of any of said interest warrants or coupons as they respectively fall due, or if default for the like period shall be made in the payment at maturity of the principal sum of money mentioned in any of the said bonds, then, and in either of said cases, it shall be lawful, and said trustee is hereby authorized, in his discretion, either in person or by his attorney or attorneys, agent or agents, to enter into and upon and take possession of all and singular the railroads, and all the other property, real, personal, and mixed, and choses in action hereinbefore conveyed or intended to be conveyed, and to take and receive the income and profits thereof, and to take possession of all books, documents, maps, and papers relating thereto, and to sell all and singular said railroads and said other property, real, personal, and mixed, and choses in action, with all the rights, liberties, privileges, and franchises of

234 said railroad company, either at public or private sale, and to execute and to deliver to the purchaser or purchasers deeds and conveyances which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said trustee and said railroad company, of, in, and to the said property, rights, liberties, privileges, and franchises, and every part and parcel thereof.

But before any sale shall be made at auction notice of such intended sale shall be published once in each week, for three weeks at least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee, and should any further notice be required by the laws of the State of Wisconsin the same shall be given.

And in case default shall at any time be made in the payment of the interest money of the bonds then outstanding, or in case default be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then, and in either of said cases, said trustee, on the written request of the holder or holders of bonds then outstanding to the amount in the aggregate of one hundred thousand dollars, shall proceed to make such sales and conveyances so as above mentioned.

Third. Said railroad company covenants and agrees to and with
235 said trustee, and his successor, that said company will from time to time during the continuance of the trust make, execute, cause to be duly recorded, and deliver to said trustee, all such further conveyances and assurances and will do all such further acts and things as may either be necessary or proper for more effectually vesting in said trustee all such right, title, interest, or estate, both legal and equitable, as said railroad company now has or may hereafter acquire of, in, or to all and every part of the property hereby conveyed or intended to be conveyed, together with the rights, liberties, privileges, and franchises aforesaid.

Fourth. Said railroad company will cause this indenture to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to this conveyance, and will pay and discharge all taxes, charges, liens, and other burdens which either exist or may hereafter arise or be imposed upon the property hereby conveyed or intended to be conveyed, and the trustee assumes no duty or responsibility on these subjects or any of them, nor in relation to any other matter or thing except as herein provided.

Fifth. The trustee is hereby authorized to appoint all such attorneys, counsellors, clerks, and other agents in addition to those provided for in said original indenture executed by and between said parties on
236 the 21st day of June, 1858, and recorded as above mentioned, as he may deem proper in the execution of the trust, and shall not be answerable for the defaults or other misconduct of said attorneys, counsellors, clerks, or other agents, unless chargeable with culpable negligence in their appointment, nor shall the trustee be responsible for anything short of gross negligence or wilful default in the discharge or omission to discharge of any of his duties.

And it is hereby expressly declared, covenanted, and agreed by the said railroad company, that the provisions herein contained for the security of said bonds are in addition to the provisions, liens, and securities made or created in that behalf in the said original deed of trust, or mortgage, executed by and between said parties, bearing date June 21st, 1858, and recorded as aforesaid, and that all such original provisions, liens, and securities are to remain in full force and effect; and, also, that all provisions in said original deed of trust or mortgage for the benefit or protection of said trustee are to remain in full force and effect, and are to be applicable to all trusts and actions, or omissions to act under this indenture, in the same manner as if all the provisions thereof had been inserted and incorporated in said original trust-deed or mortgage.

237 Said trustee hereby accepts and covenants and agrees, to and with said railroad company, faithfully to execute said trust.

In witness whereof, said railroad company has hereto affixed its corporate seal and cause' the same to be subscribed by its president and secretary, and the trustee has subscribed his name and affixed his seal, the day and years first above written.

Seal written: "La Crosse & Milwaukee R. R. Company."

LA CROSSE & MILWAUKEE RAILROAD COMPANY,
By N. P. STANTON, *President.*
LOCKWOOD L. DOTY, *Secretary.*
[SEAL.] WILLIAM BARNES, *Trustee.*

Signed, sealed, executed, and elivered in our presence as to the La Crosse & Milwaukee Railroad Company, by N. P. Stanton, president:

BYRON KILBOURN.
T. W. BEAVER.

Signed, executed, and delivered in our presence as to Lockwood L. Doty, secretary of said La Crosse & Milwaukee Railroad Company:

EDWARD P. WHALING.
T. W. BEAVER.

Signed, sealed, executed, and delivered in our presence as to William Barnes, the said trustee:

JOHN G. WHITE.
ISAAC EDWARDS.

238 STATE OF WISCONSIN,
County of Milwaukee, ss:

Be it remembered, that on this twenty-fourth day of August, eighteen hundred and fifty-eight, before me personally appeared Nehemiah P. Stanton, described in and who executed the above instrument in writing as the president of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the said instrument as president as aforesaid, freely for the purposes therein stated, and I certify that the said person who made the said acknowledgement is personally known to me to be the individual described in and who executed the said instrument; and the said Nehemiah P. Stanton, being by me duly sworn, says that he is the president of the La Crosse & Milwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and seal official, at my office, No , Third street, in the city of Milwaukee, the day and year above written.

239 Given under my hand and official seal the day and year above written.

[SEAL.] EDWARD P. WHALING.
Notary Public, Milwaukee County, Wisconsin.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Be it remembered, that on this 24th day of August, eighteen hundred and fifty eight, before me personally appeared Lockwood L. Doty, to me well and personally known to be the person described in and who executed the above instrument in writing as secretary of and in behalf of the La Crosse & Milwaukee Railroad Company, and acknowledged that he executed the same freely and as the free act and deed of the said La Crosse & Milwaukee Railroad Company, for the uses and purposes therein mentioned, and the said Lockwood L. Doty, being by me duly sworn, says that he is the secretary of the La Crosse & Milwaukee Railroad Company, the above named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

240 In testimony whereof, I have hereunto set my hand and seal official, at my office, No. , Third street, in the city of Milwaukee, the day and year abovewritten.

Given under my hand and official seal the day and year above written.

[SEAL.] EDWARD P. WHALING,
Notary Public, Milwaukee County, Wisconsin.

STATE OF NEW YORK,
County of Albany, ss:

Be it remembered, that on the sixteenth day of August, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney or other writing, under seal or not, administer oaths and take and certify depositions to be used or recorded in the said State of Wisconsin, appeared William Barnes, described in and who executed the above instrument of writing between him, as one of the parties thereto, and the La Crosse and Milwaukee Railroad Company, the other party thereto, and the said William Barnes acknowledged that he executed the said instrument freely for the purposes therein
241 stated, and I certify the said person who made the said acknowledgement is personally known to me to be the individual described in and who executed the said instrument.

In testimony whereof, I have hereunto set my hand and seal official, at my office, No. seventy-one, State street, in the city of Albany, the day and year above written.

Given under my hand and official seal the day and year first above written.

[SEAL.] EDWARD WADE,
Commissioner of the State of Wisconsin, in and for the State of New York.

Recorded Sept. 1st, 1858, at 8 o'clock a. m.

242 Said plaintiff by his said counsel offered in evidence the record of a suit commenced in the circuit court of the United States for the district of Wisconsin, on the 17th day of July, 1865, wherein Fred. P. James and Abram M. Brewer, copartners under the firm name of F. P. James & Co., E. Bradford Greenleaf, Phillip S. Justice, Elkanah Cobb, John V. Bean, Phillip Wilson, and J. Howard Mitchell, copartners under the firm name of Phillip S. Justice & Company, against the Milwaukee and Minnesota Railway Company, S. Chamberlain and the La Crosse and Milwaukee Railway Company. Subpœna was served on the Milwaukee and Minnesota Railway Company, by delivering the same to Moses Kneeland, president of said company, and on the La Crosse & Milwaukee Railroad Company by delivering subpœna to Daniel Wells, jr., president of said company, and on Selah Chamberlain by delivering to him personally a copy of the subpœna on the 22nd day of April, 1863. The appearance of the Milwaukee & Minnesota Railroad Company was entered on the first day of June, 1863. July 6th, 1863, the Milwaukee & Minnesota Railroad Company demurred to the bill. The 22nd of April, 1864, the demurrer to said bill was withdrawn, and the Milwaukee & Minnesota Railroad Company filed its answer to the bill. The bill sets out the recovery of divers judgments
243 against the La Crosse & Milwaukee Railroad Company subsequent to the Barnes mortgage; the issue of executions thereon, and the returns on said executions of "no property found," sets out prior encumbrances on the property of the La Crosse & Milwaukee Railroad, and then alleges the following in relation to the so-called Barnes mortgage:

Your orators further show, that about the first day of June, in the year 1858, the said La Crosse & Milwaukee Railroad Company was in-

debted to a large amount, and greatly embarrassed in its pecuniary affairs, and that a large floating debt had accumulated against the said company for rolling-stock and materials furnished and labor performed for said company, which remained unpaid, and was unsecured by any mortgage or other security on the road or other property of the company, and that a large number of persons along the line of said railroad in Wisconsin had mortgaged their farms to the said company to aid in the construction of the said road, which farm mortgages had been used by the company, with the stipulation on its part to pay the interest accruing thereon, and that considerable amounts of interest on such mortgages were then due and unpaid, and that still larger amounts were then accruing. That the aggregage nominal amount of
244 debt existing against said company in the month of June, 1858, including funded and secured debt, was near or quite ten millions of dollars, exclusive of the farm mortgage debt above-named, amounting to about one million one hundred and ten thousand dollars additional, exclusive of interest. That at that time Selah Chamberlain, one of the defendants, was in possession of the said road, under a contract, lease, or mortgage to secure him the amount due him from said company on contracts for the construction of said road.

Your orators further show that the directors of the La Crosse and Milwaukee Railroad Company on the first day of June, 1858, authorized an issue of the bonds of said company to the amount of two millions of dollars, to be secured by a mortgage upon the entire line of the road from Milwaukee to La Crosse, including all their real and personal property appertaining to said line of said road, payable thirty years from date, and bearing interest at the rate of seven per cent. per annum from the 1st day of July, 1858, payable semi-annually after the first year, the first payment of interest to be made on the 1st day of July, 1859, said bonds to be printed in the usual form with coupons, and the mortgage security for the same to be executed by the president and
245 secretary of the said company to William Gould, esq., trustee for said bondholders. And the said were afterwards, on the 15th day of June, 1858, so amended as to make William Barnes, esq., trustee, in the place of William Gould, and the number and denomination of the bonds to be issued were so changed, that the first payment of interest should become due on the first day of January, A. D. 1859, instead of the 1st of July, 1859, as by said resolutions, reference being thereunto had, will more fully appear; that on or about the 21st day of June, 1858, the president and secretary of said company did execute a trust deed in the name of said company to the said William Barnes, and the said president and secretary, in the name of said company, did make, sign, seal and execute bonds to the amount of two millions of dollars, secured by said trust-deed, one thousand bonds of one thousand dollars each, fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, all dated the 21st day of June, 1858, with interest at the rate of seven per centum per annum, payable semi-annually on the first day of January and July in each year, with coupons for said interest respectively attached. That on the 11th day of August, A. D. 1858, the secretary of the said La Crosse & Milwaukee Railroad Company, in the name of said company, executed and
246 delivered to said William Barnes a certain indenture of supplementary mortgage.

Your orators charge upon information and belief, and state the fact to be, that said mortgage or trust-deed of the 21st of June, to the said William Barnes, as also the supplementary mortgage of the 11th of Au-

gust, were issued in fraud of the creditors and stockholders of said company, and without authority of law. That said mortgages or deeds of trust were not executed to secure any amount borrowed or owing by said company, but for the purpose and with the design of bringing about a speedy sale of said road and its franchises, and cutting off the stockholders in said company, and to hinder, delay and defraud the creditors of the said La Crosse and Milwaukee Railroad Company, and passing the title and property in or to the road and its franchises to some of the directors of said company and their friends. That in the month of May, 1858, N. P. Stanton, Eli Perry, William Watson, D. V. N. Radcliff, Artemus Fish, George W. Luther, J. H. Shears, all of Albany, New York, and John P. McGregor and William E. Smith, of Wisconsin, were elected directors for the said La Crosse and Milwaukee Railroad Company, for the then ensuing year. On the 8th day of June, 1858, Fish and
247 Watson resigned, and William A. Guest was elected a director, and on the 15th day of June, Albert C. Gunnison was elected a director to fill the vacancy.

On the same day Radcliff resigned and Alfred Noxon was elected in his place. That about the 22nd day of September, 1858, said Shears resigned as director, and one William Platt was elected in his place. That on the 15th day of June, A. D. 1858, the said Gunnison and Guest, with said Noxon, Luther and Shears, five of said directors, at a meeting which they called a meeting of the board of directors of said company, held in the city of Albany, State of New York, by resolution directed a modification of the bonds to be issued under said trust-deed so as to make the first instalment of interest payable on the 1st day of January, 1859, instead of the 1st day of July, 1859, which modification was made that they might the more speedily carry out their fraudulent design of selling out the road and its franchises on said trust-deed. At that same meeting in Albany aforesaid, by resolution of said directors, William A. Guest, Albert C. Gunnison and Alfred Noxon were appointed a committee of said board of directors, with full power to do all things which might lawfully be done by the board of directors in the collection, settlement and compromise of all claims and demands due the com-
248 pany, and in the payment, settlement and adjustment of all claims, debts, and demands due from the company, and to sell, dispose of, or negotiate any part of the bonds of said company, secured by its said mo tgage, at such rates and in such quantities as to them should seem proper and for the best interest of said company.

That said committee soon thereafter made a settlement with Selah Chamberlain of a claim which he had against said company, and gave him the promissory note of said company for twenty thousand dollars, payable in two or three months, and agreed to deposit with him four hundred thousand dollars of said bonds as collateral security, and did about that time deposit with him two hundred thousand dollars of said bonds. They paid him five thousand dollars in cash, which your orators have been informed and believe, and therefore state, was raised by the hypothecation or pretended sale of one hundred thousand dollars of said third mortgage bonds; and in the month of October or November, the said committee pretended to deliver to said Selah Chamberlain two hundred thousand dollars more of said third mortgage bonds, as collateral security for said twenty thousand dollar note.

And afterwards, to wit, on or about the 10th day of January, 1859, said bonds were divided up between the said committee and their
249 friends, without being sold at a public sale, as follows: Albert C. Gunnison, seventy-five thousand dollars; the said Platt, one

hundred thousand dollars; the said Guest, fifty thousand dollars; the said Luther, fifty thousand dollars; the said Noxon, seventy-five thousand dollars; H. G. Gilbert, fifty thousand dollars; and portions of said bonds afterwards came to the possession of said Stanton and Alden and said Gilbert, but in what amounts complainants are unable to state; and that said bonds were not all taken directly in the names of said persons above named, but were taken in the names of other persons, their agents or accomplices in above mentioned transaction.

Complainants further show unto the court, upon like information and belief, that in the further execution of said illegal and fraudulent design, at an illegal meeting of the directors, in the city of Albany, in the State of New York, held on the 13th day of December, 1858, after reciting that they had received information from Milwaukee that a very large amount of the most valuable property of said company in the city of Milwaukee, including its machine-shops, engine-houses, and repair-shops, which had cost the company one hundred and fifty
250 thousand dollars, was in imminent peril of being lost to the company in consequence of the non-payment of the sum of ten thousand dollars, being the amount due on contract for the purchase of the premises, and that the company were entirely destitute of means to save from total loss the said property, and that sales of property indispensible to the company had already been made, but which might still be redeemed, and that the company had not until a then recent date been aware of the condition of said property, and that arrangements theretofore made with Mr. Chamberlain to furnish money to protect the property of the company from sale, and for defraying the expenses and salaries incident to their organization, had been repudiated by said Chamberlain, it was "resolved that the president be, and he is hereby directed to borrow or loan a sum of money not exceeding fifteen thousand dollars, to be used for the purposes above recited, and to sell, pledge, or hypothecate any bonds or securities belonging to the company, for the purpose of raising said amount, upon the best terms he may be able to obtain the same."

And your orators further show, upon information and belief, that the president of said company borrowed of William Gould, during said month of December, the sum of two thousand five hundred dol-
251 lars, and of William Watson the further sum of two thousand five hundred dollars, for which he gave the said Gould and Watson the promissory notes of the company, payable in a few days thereafter (your orators are unable to state the time more particularly), and gave to each of said persons fifty thousand dollars of said third mortgage bonds as security for the payment of said notes. And in like manner and at or about the same time the said president borrowed of Seth R. Foster the sum of three thousand dollars, and of Henry G. Gilbert the sum of seven thousand five hundred dollars, for each of which sums he executed and delivered the promissory notes of the company, payable in a few days after the date of said note, and deposited the third mortgage bonds with each as security for the payment of said notes, at the rate of five per centum of their par value, making in the aggregate the sum of fifteen thousand five hundred dollars money borrowed, and as security for which bonds as aforesaid were deposited to the amount of three hundred and ten thousand dollars. And the said complainants, on information and belief, aver that the said notes were given and the securities pledged with the understanding between the said directors and the said Watson, Gould, Gilbert, and Foster, that

said notes would not be paid, nor the said securities be in any
252 manner redeemed by said railroad company.

Your orators, on their information and belief, further show to the court, that the round-house and other property in the said city was at the time of the passage of said resolution subject to certain encumbrances and claims for unpaid portions of the purchase money, but it was utterly false, as the directors in Albany well knew, that said company was in imminent peril of losing any portion of its said property by reason of such encumbrances and claims. That John P. McGregor and William E. Smith aforesaid, the two directors of said company resident in Wisconsin, had agreed with the owners or holders of such encumbrances, by which, upon payment to them of a small portion thereof, time was to be given to the said company for one and two years within which to pay the residue thereof. That the two directors had also made an arrangement or agreement with the said Chamberlain, lessee, to advance the amount necessary to be paid to procure such extension. And said Chamberlain was ready and willing to pay the same whenever requested, and in the case of one encumbrance upon such property, the said Chamberlain, lessee, had paid the amount thereof before said money was so borrowed as aforesaid; all of which facts the said President
253 and the said directors at Albany then well knew. That the said Stanton, president, after having borrowed said money in manner as aforesaid, and in the latter part of the month of December, 1858, did visit the said city of Milwaukee for the ostensible purpose of paying off said encumbrances; that he was immediately informed of the arrangements made to prevent the loss of the said property, and was then urged by the resident directors to return to Albany, and with the said money pay the notes aforesaid, and in that manner redeem said bonds and save their total loss to the said company; that said president utterly refused to do so, and insisted upon paying out a portion of said money upon said encumbrances, for the fraudulent purpose of preventing the payment of said notes and the redemption of said bonds; that he paid between five and six thousand dollars upon one of said encumbrances, and insisted upon paying to said Chamberlain the amount he had advanced to take up another encumbrance; that in the first case the said president paid but about one-half of the amount due thereon, and that the payment was not sufficient to prevent the loss of said property to said company, and was not intended so to do; and in the other case all proceedings against said company had been already stayed
254 by the action of said Chamberlain.

And the said complainants, on their information and belief, further show to the court, that it was utterly false, as pretended by said directors, that said company was destitute of means to save said property from total loss; that, on the contrary thereof, there was in the possession or under the control of the members of said board, and of the said Alden at the very time said money was borrowed, more than twelve thousand dollars in money, besides a large amount of other securities belonging to said company; all of which the said directors then well knew. That at the very time the said president was in Milwaukee as aforesaid there was in his possession or under his immediate control and belonging to said company money enough to have fully discharged the encumbrances or claims described in the preamble and resolution aforesaid in addition to the amount so borrowed as aforesaid; that he was requested and strongly urged to make such payments and to return the borrowed money, and so save the bonds of said company, which was utterly refused by said president.

And your orators further show to the court, upon information and belief, that the said directors and the holders of said bonds, so
255 unlawfully and illegally issued, in further prosecution of the said fraudulent design combined and confederated together to defraud, hinder and delay the creditors of the said company, and particularly your orators, complainants in this suit, by borrowing the said money and depositing the said bonds as security, never intending to pay the said notes at their maturity, in order that the said bonds should be sold and they enabled thereby to purchase them for a mere nominal consideration, well knowing that said notes would not paid at their maturity and that there was no necessity whatsoever on the part of said company for such sacrifice of its corporate property; and that the president never intended to apply but about seven thousand five hundred dollars of said money to the purposes for which the same was so borrowed as aforesaid, but that he and said directors appropriated the residue thereof to their own private and individual purposes. And your orators further show, upon information and belief, that in pursuance of such fraudulent purpose the said Gould and said Watson, and the said Foster and Gilbert were induced by said directors on or about the day of 1859, without even offering said bonds at public or private sale in any manner whatever, to divide said bonds among themselves and others, their confederates, the said Gould taking fifty thou-
256 sand dollars for his note of $2,500; and the said Watson taking $50,000 for his note of $2,500.00 thereof; that the said Gilbert delivered seventy-five thousand dollars of the bonds in his hands to one Roscius P. Kennedy, who was the agent of said Noxon, and received therefor $3,750; and fifty thousand dollars to one J. M. Lovitt, who received therefor $2,500; and $15,000 to one J. M. Gilbert, who received therefor $750; five thousand dollars to one Templeton, who received therefor $250; in all he received $7,250—the said parties paying the said Gilbert five cents on the dollar of the par value thereof. And the said Foster took sixty thousand dollars of said bonds in payment of the said note of $3,000 to him.

That at the time said three hundred and ten thousand dollars of said bonds were so divided among said persons, there was then in the hands or under the control of said directors more money belonging to said company than was necessary to pay said notes in full, and so have prevented and save the loss of said bonds to said company, and their property to their creditors, all of which said directors and their confederates then well knew.

And these complainants, on their information and belief, further show that said Noxon and Guest, the said committee, disposed of other of said bonds to their friends and confederates, either without any
257 consideration whatsoever, or at the mere nominal rate of five cents on the dollar, in further prosecution of their fraudulent conspiracy; but they are unable now to set forth the particulars with certainty.

Your orators are informed and believe, and so charge the fact to be, that only about two hundred thousand dollars of said third mortgage bonds were issued to the bona fide creditors of said company, and that said bonds so issued were exchanged for the indebtedness of said company in the State of Wisconsin and to citizens of the State of Wisconsin, at par, and in payment of a small amount of interest to the land-grant bondholders, while the rest of the fifteen hundred thousand dollars in bonds, pretended to have been issued by said directors were all fraudulently issued and disposed of by said directors.

And your orators further show, upon information and belief, that the directors of said La Crosse & Milwaukee Railroad Company, in pursuance of said fraudulent scheme, made no provision for the payment of the interest upon said third-mortgage bonds, which interest became due and payable on the 1st January, 1859; and the said Barnes, as trustee,
258 on or about the 1st February, 1859, commenced the foreclosure of said mortgage by advertisement, and (having previously given the notice required by law in that behalf) on the 21st day of May, 1859, sold at public auction at the court-house in the city and county of Milwaukee, in the State of Wisconsin, all the property, rights, privileges, franchises, things in action, and other things in said mortgage and supplementary mortgage to him, said Barnes, described. And the said William Barnes, trustee, then and there at said sale became the purchaser thereof for the sum of one million five hundred and ninety-three thousand dollars and thirty-three cents, payable in said bonds, and as trustee for said bondholders, no other person or body having made any bid whatever for the same.

That immediately thereafter, to wit, on the 23rd day of May, 1859, the said bondholders proceeded to organize a new corporation under and by virtue of the laws of the State of Wisconsin, and took the name of the Milwaukee and Minnesota Railroad Company, and the said Barnes then and there conveyed to said last-named company all the property and things by him purchased as aforesaid, and the said company now claims to be the owner of said property in fraud of the rights of your orators and the stockholders and creditors of said La Crosse & Milwaukee Railroad Company.

259 Your orators further show, upon information and belief, that the said third-mortgage bonds have never had any market value, and have never been quoted at the stock boards of the country, but their circulation and transmission from hand to hand has been exclusively confined to private transactions and to parties thoroughly and well advised of their origin and all facts and circumstances connected with their issue.

Your orators further charge, upon information and belief, that the said stock of the Milwaukee and Minnesota Railroad Company, into which said bonds were converted, has never had any market value, and has never been quoted at the stock boards, and the only sales or transfers have been private transactions and between parties who were fully notified and advised of the fraudulent character of said stock and of the facts above set forth.

Your orators further show, upon information and belief, that said Milwaukee and Minnesota Railroad Company have not as yet been in possession of any portion of said road, but that said road has been held adversely to said company; but your orators are informed and believe that said company has combined and confederated with the trustees of the second mortgage on the eastern division of said road, or their agent
260 or attorneys, with the view to obtain the possession of said road, and said company now threatens to take possession of said road and its franchises under said fraudulent and corrupt organization, and appropriate said property and its franchises to its own use.

Your orators further show, upon information and belief, that the said Barnes, trustee in said mortgage named, was fully advised of the fraudulent issue of said bonds, and was confederating with the said directors for the sale of said road, and that the bonds, for the payment of which said road was sold, were, a large majority of them, illegally issued and held by the directors of the old company and their immediate friends,

on a mere nominal consideration, and were fraudulent and void; that in pursuance of said original scheme, the road was sold at the par value of said bonds and interest and the costs of sale, so as more effectually to prevent the stockholders of said company from redeeming the property from said sale, and to secure the road and franchises to said confederates and fraudulent bondholders, and to defraud, hinder, delay and defeat your orators from collecting their just claims against said road and property.

Your orators are informed and believe that the said directors of the La Crosse & Milwaukee Railroad Company, in pursuance of said fraudulent scheme, issued to said Barnes, trustee, fifty thousand dol-
261 lars of said bonds, to compensate him as trustee and for services in foreclosing said mortgage, and that counsel were employed to assist in said foreclosure and paid by said directors out of said bonds belonging to said company.

Your orators further say, upon information and belief, that at the time of the sale of said road the directors of said company had not negotiated or disposed of the amount of bonds for which said road was sold, but that a large amount of said bonds were in the hands of said directors or their agent, unnegotiated, and which had been fraudulently negotiated and disposed of by said directors since said sale, which were counted in to make up the amount of the bid made by said trustee to swell the amount necessary to be paid to redeem said property from said sale, and more effectually to cut off, hinder, delay, and defraud the creditors and stockholders of the said La Crosse and Milwaukee Railroad Company.

Your orators further show that heretofore, to wit, on the 6th day of July, 1860, the United States district court for the district of Wisconsin, on the motion of said Bronson & Soutter, trustees of said so-called second mortgage bonds, eastern division, appointed a receiver of all
262 the railroad of the said La Crosse & Milwaukee Railroad Company, being all the line of railroad extending from the city of Milwaukee to the city of La Crosse, in the State of Wisconsin, and of all its property, real and personal, privileges and franchises; that from and since that day to the present time, said premises have been in the possession and operated by the receiver of said court.

That since that time the cause and the jurisdiction over said receiver has been transferred by act of Congress to the circuit court of the United States for the district of Wisconsin. That the premises are of great value, exceeding the sum of $2,000,000, and much exceeding the amount due on the mortgages above described, exclusive of said third mortgage, so called, to said Barnes, trustee, which your orators claim, by reason of the facts and allegations herein contained, to be void as against creditors, or, if not wholly void, to have been cancelled and merged into the fee. That the income of said premises has been large, about the sum of $2,724,291.28, in gross, to January 1st, 1863, since the road has been in the hands of the receiver. Your orators are entirely ignorant of what the net earnings are, but they believe the operating expenses do not exceed one half of the gross income. That, notwithstanding this large net income, the said receiver fails to pay the interest on said
263 mortgages or any one of them, except the annual interest on said first mortgage, eastern division, and on said city mortgage; the annual interest on both amounting to $93,980, a mere fraction of the net income of the road. Said receiver has also paid a part of one installment of semi-annual interest on the land-grant mortgage, viz., the sum of $70,000; that on all the other mortgages, except said third mort-

gage, so called, void, cancelled, or merged as aforesaid, the interest is accumulating, and consequently and very largely increasing said mortgage liens as against your orators, and are now about $828,000 larger by accumulations of unpaid interest than when your receiver took possession thereof.

Your orators justly fear, and therefore charge, that if the premises are continued unsold in the hands of said court or its receiver, the accumulation of interest will be so great as to absorb or destroy all the value of said premises over and above said mortgages, and thus prevent your orators from collecting or in any way receiving the payment of their claims.

Your orators allege that if said premises can be speedily sold, subject to all of said mortgage liens, except said so-called third mortgage, void or cancelled by said sale or merged as aforesaid, there are purchasers for said premises who will assume and pay said mortgages last
264 above named, and will pay a sufficient sum in addition thereto to pay your orators' claims in whole or in part.

Your orators further aver that since the sale of said premises by and to said Barnes, the said La Crosse and Milwaukee Railroad Company has virtually ceased to exist, and has left no other assets except such as are embraced in said mortgage deeds, or some of them.

And your orators further show that the defendant Selah Chamberlain has or claims some interest in the premises, the exact extent or nature of which is to your orators unknown.

In consideration whereof, and forasmuch as your orators are entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable, your orators humbly pray that you will take their case into consideration, and upon finding the allegations therein contained to be true, to order and decree that all the property, real and personal, franchises and privileges of the La Crosse and Milwaukee Railroad Company, or which was theirs at the time of said sale by said Barnes, May 21st, 1859, now in possession of the receiver of said United States circuit court, and more fully
265 described in the orders of said court appointing said receiver, and in the mortgage and trust deeds above recited, to which your orators beg leave to refer and make a part of this their bill, may be sold subject to the prior claims under said mortgage above described as, 1st, the first mortgage, eastern division, to Francis A. Palmer, trustee; 2nd, the second mortgage to the city of Milwaukee; 3rd, the third or land-grant mortgage to Bronson, Soutter and Knapp, trustees; 4th, the fourth or second mortgage, eastern division, to Bronson and Soutter, trustees; the fifth, or Helfenstein mortgage, to J. Albert Helfenstein, trustee; and that the proceeds of said sale be brought into court to be divided according to the legal priorities of your orators and the other claimants thereto.

And to the end that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may full, true and perfect answers make to this your orators' bill. And complainants pray that said sale under said third mortgage may be decreed to bo fraudulent and void, and the said Milwaukee and Minnesota Railroad Company be decreed to take nothing under said sale, and that said Milwaukee and Minnesota Railroad Company be perpetually enjoined and restrained from taking possession of or exercising any con-
266 trol over the property and franchises mentioned in said third mortgage, or from interfering in any manner with said road or its franchises, or the management thereof.

And your orators pray the court that a receiver may be appointed by the court to take possession of and manage and control all the property and franchises, things in action, and effects of the said La Crosse & Milwaukee Railroad Company, and the Milwaukee & Minnesota Railroad Company, and their attorneys, counsellors, solicitors, officers, agents, trustees and servants, therein and thereby, under a certain penalty in said writ to be expressed, commanding and enjoining them and each of them in manner as aforesaid until the further order of this honorable court.

May it please your honors to grant unto your orators a writ of subpœna issued out of and under the seal of this honorable court, to be directed to the said La Crosse and Milwaukee Railroad Company and the Milwaukee and Minnesota Railroad Company, to Selah Chamberlain, commanding them at a certain day and under a certain penalty therein to be inserted, personally to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as
267 to your honors shall seem agreeable to equity and good conscience.

And your orators humbly pray that they may have such other or further relief in the premises as to your honors shall seem meet and this case may require.

Said defendant, the Milwaukee and Minnesota Company, answered the said bill.

Circuit court of the United States for the ninth circuit and district of Wisconsin. In equity.

F. P. JAMES AND OTHERS
vs.
THE MILWAUKEE AND MINNESOTA RAILROAD Company and others.

The separate answer of the Milwaukee & Minnesota Railroad Company, one of the defendants, to the bill of complaint of Frederick P. James, Abram M. Bowers, E. Bradford Greenleaf, Phillip S. Justice, Elkanah Cobb, John V. Bean, Phillip Wilson, J. Howard Mitchell, complainants.

This defendant, the Milwaukee and Minnesota Railroad Company, one of the defendants to said bill of complaint, now and at all times hereafter saving and reserving unto itself all benefit and advantage of exceptions which can or may be had or taken to the many er-
267½ rors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant answering saith:

That the several actings and doings hereinafter stated and set forth, so far as they purport to be acts or doings of this defendant, are true to its own knowledge, and as to all other matters and things hereinafter stated and set forth, this defendant is informed and believes the same to be true, and states the same upon said knowledge and said information and belief respectively.

1. This defendant admits, upon information and belief, that such are the facts, that the said Litchfield, the said Bouton, the said Phillip S.

Justice, Elkanah Cobb, John V. Bean, Phillip Wilson, and J. Howard Mitchell, and the said E. Bradford Greenleaf did obtain the several judgments as set forth in said bill of complaint; but this defendant, further answering, says that whether the several proceedings have been had on said respective judgments, as in said bill of complaint alleged, and whether the said complainants are now the legal or equitable owners of either or any of said judgments, as in said bill of com-
267½ plaint stated, except said Litchfield judgment, this defendant has no knowledge nor information sufficient to form a belief, and can therefore neither admit nor deny the said statements in that behalf, but leaves the said complainants to make such proof thereof as they may be able; but this defendant, on information and belief, says that the said Litchfield judgment now equitably belongs to this defendant, and that the same was purchased by one Russell Sage, while president of this defendant, from said Litchfield, really for the benefit of this defendant, and that said complainants have no right or title to, or interest in, said Litchfield judgment, and the said Litchfield is now a stockholder of this defendant to the amount of two hundred and fifty shares, which he holds instead of said judgment.

2. This defendant admits, upon information and belief, that such are the facts, that the said La Crosse & Milwaukee Railroad Company made, executed, and delivered the several mortgages to Palmer to or for the benefit of the city of Milwaukee, to Bronson, Soutter, and Knapp, to Bronson and Soutter, and to Helfenstein, as stated in said bill of complaint, and admits that in June, 1858, Selah C. Cham-
268 berlain, one of the defendants, was in possession of the said road under a contract of lease, which the said Chamberlain pretended was to secure him certain amounts claimed by him against said company; but this defendant, answering as aforesaid, says that the said lease to said Chamberlain was made, executed, and delivered to him, and accepted by him, for the purpose and with the design and intention to thereby hinder, delay, and defraud the creditors of said company; and that the same therefore was fraudulent and void.

And this defendant, further answering, says that in a certain cause pending in the district court of the United States for the district of Wisconsin, in equity, on the 11th day of February, 1854, in which Newcomb Cleveland was complainant and the said La Crosse & Milwaukee Railroad Company, Selah Chamberlain, and others were defendants, and in which cause the said district court had full jurisdiction of and over the subject-matter of said cause, and the said parties thereto, and in which cause both said company and said Chamberlain had appeared and submitted to the jurisdiction of said district court, the said court made, rendered, recorded, and enrolled its decree, annulling, setting aside, and vacating said lease to said Chamberlain absolutely and as to all persons and parties, so that the same should not thereafter be of any force or effect whatever.

269 And this defendant, further answering, says that the said Selah Chamberlain is not, and at the time of the exhibiting of the said bill of complaint in this cause was not a lien creditor of the said La Crosse & Milwaukee Railroad Company, and has no interest in, claim to, or lien or incumbrance on any of the railroad property, franchises, or other things mentioned in said bill of complaint, and this defendant insists that the said Chamberlain is not a proper or necessary party to said bill of complaint.

And this defendant here and now takes and insists upon its objection to said bill of complaint that it has improperly joined said Chamber-

lain as a party, although he has no interest therein, and claims that said bill of complaint should be dismissed as to said Chamberlain. And this defendant claims and prays the same benefit of this objection as if it had made said objection in a demurrer to said bill.

And this said defendant further objects that the said bill of complaint cannot be maintained as to the said judgments rendered in favor of said Justice, Cobb, Bean, Wilson, and Mitchell by the circuit court of Milwaukee County, Wisconsin, and that said Justice, Cobb, Bean, Wilson, and Mitchell are improperly joined as complainants in said bill, and that said bill is defective for that reason, and ought to be dismissed.

270 And further, this defendant answering, on information and belief, says that said John V. Bean, one of said complainants, and one of the persons in whose favor said last named judgment was rendered, has departed this life, and that the said bill of complaint is for that reason defective; and this defendant claims the same benefit of these objections as if the same had been taken by this defendant in a demurrer to said bill of complaint.

And this defendant further insists that the said bill cannot be maintained in this court as to the said judgments rendered by the county court for Milwaukee County in favor of said E. Bradford Greenleaf, and that said Greenleaf is improperly joined as a complainant in said bill; and this defendant claims and prays the same benefit from this objection as if this defendant had taken the same in a demurrer to said bill.

The said defendant, further answering the said bill of complaint, on information and belief says that the La Crosse & Milwaukee Railroad Company was from the 1st day of January, 1850, until the 1st day of May, A. D. 1860, a corporation existing under the laws of the State of Wisconsin, and that during that time its business affairs were managed by a board of directors; that about the 21st day of June, A. D. 1858, said company was indebted to a large amount of floating debt

271 accumulated for rolling-stock and materials furnished and provided and labor performed for said company, which was unsecured upon the railroad or other property for said company; and that a large number of farmers along the line of said company's railroad had before then loaned their credit in form of bonds and mortgages to aid said company in the construction and equipment of its said railroad; which bonds and mortgages had been before then used by the said company, with a stipulation on its part with and to said farmers to pay the interest that might accrue thereon, and that a large sum of interest which said company was bound to pay as aforesaid had become due and the said company was unable to pay the same, and proceedings were threatened against such farmers to enforce payment of such interest; and that the said company, for the purpose of securing said indebtedness and said interest, and for other legitimate and necessary purposes, did on or about the day and year last aforesaid make, sign, seal, execute and perfect, ready to be negotiated, sold, delivered and transferred in payment of said indebtedness of said company and in payment of said interest, and to be used in and about the necessary and proper business of said company, one thousand bonds of one thousand dollars

272 each, and fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, all dated that day and year and payable in A. D. 1888, with interest at seven per cent. payable semi-annually on the first day of January and July of each year, with coupons for said interest to said bonds respectively attached.

And that to secure the payment of said bonds, and thereby enable said company to use said bonds for the purposes aforesaid, the said

company did on the said 21st day of June, 1858, make, execute, sign, acknowledge and perfect its mortgage or deed of trust in due form of law, and as it by law had authority to do, to William Barnes, to secure the payment of said last named bonds and the interest thereon, in and by which said mortgage or deed of trust said company mortgaged to said Barnes, trustee, for the purposes aforesaid, "all and singular the railroad of said company commencing in the city of Milwaukee and running from thence to La Crosse, a distance of about two hundred miles," a part of which road had been constructed and was then in full operation, and the residue was then in process of construction, including all and singular the several tracts, pieces or parcels of land which then were or thereafter might be or constitute the site of the roadways, turn-outs, engine-houses, workshops, depots and other buildings, and
273 all the other lands and real estate which then constituted or might thereafter constitute, or be a part of or appertain to, said railroad, whether then made or to be made thereafter, and all the engine-houses, workshops, depots and other buildings, and all the otherimprovements on or appertaining to said railroad, whether then made or built or to be built and made thereafter; and all and singular the locomotive-engines and other rolling-stock, and all the other equipments of every kind and description which had then been or might thereafter be procured for or used on said railroad, and all the materials, tools, implements, utensils, and other personal property which had then been or might thereafter be procured for or used in connection with such railroad; and also all and singular the rights, liberties, privileges and franchises of said railroad to La Crosse, together with other property and things in said mortgage described; and that about the said 21st day of June, A. D. 1858, said mortgage was by said company duly and legally delivered to said William Barnes, trustee, and was by said trustee thereafter caused to be duly and legally recorded in the office of the secretary of the State of Wisconsin, and, as the plaintiff says on information and belief, in the offices of the registers of deeds in the several counties through which said railroad passes and was then located.

274 That on the 11th day of August, 1858, the said company made, signed, sealed, and delivered to said Barnes, trustee, a certain indenture of supplemental mortgage or deed of trust, in and by which said company recited and affirmed the terms and conditions of said mortgage or deed of trust hereinbefore set forth, and dated June 21st, 1858, and did convey to said Barnes, as trustee as aforesaid, in addition to the things in said first mortgage conveyed, the following, that is to say:

All and singular the rights, privileges, liberties, and franchises of said company, of every kind and description, and also all lands granted or intended to be granted to said company under and by virtue of the act of Congress and the act of the legislature of the State of Wisconsin, in said supplementary mortgage mentioned; and also all the hereditaments and appurtenances belonging or in any wise appertaining to the lands and real estate therein conveyed or intended to be conveyed; and also all and singular the stock, railroad or other bonds, bills of exchange, promissory notes, accounts, choses of action, demands, and choses in action of whatsoever nature, which might be owned or in which said company might have an interest, on such day as such company might first make default in the payment of the interest or principal, or any part thereof, which might thereafter become due on any of the
275 said bonds issued or to be issued by said company, and to secure which said mortgage was given.

That immediately thereafter the said Barnes caused said supplementary mortgage to be recorded in the same offices as the first named deed of trust or mortgage to said Barnes was recorded, as hereinbefore set forth, a copy of which said first mortgage or deed of trust and a copy of which said supplementary mortgage or deed of trust to said Barnes are attached hereto, and marked, respectively, Exhibit No. 1 and Exhibit No. 2.

That immediately thereafter said company commenced to deliver the said last-named bonds, so secured as aforesaid, in payment of the indebtedness of said company, and for the other purposes contemplated by said company in the issue thereof, and in the necessary and proper business of said company; and that all of said bonds were sold and delivered in payment and transferred by said company for the purposes and in the manner contemplated as aforesaid by said company, and that large numbers of said bonds were paid and delivered to residents of the State of Wisconsin in payment of the indebtedness of such persons against said company for materials furnished to and services rendered for said company, and that large numbers of said bonds are now
276 held by such persons in the said State, or have been by them turned into the stock of the Milwaukee and Minnesota Railroad Company, as hereinafter stated, and that a large number of said bonds have passed into circulation in the bond and stock markets of the United States, particularly in the city of New York, which are now held by bona fide purchasers and owners, or have by them been turned into the stock of the Milwaukee and Minnesota Railroad Company, as hereinafter mentioned.

That about the 1st of February, A. D. 1859, the said company having made default in payment of or part of the interest due on said bonds, secured as aforesaid, the said William Barnes, in pursuance of the provisions of the laws of the State of Wisconsin then in force in that behalf, and the provisions contained in said mortgages or deeds of trust, proceeded to the foreclosure of said mortgages by advertisement; and, having previously given the notice required by law in that behalf, on the 21st of May, A. D. 1859, said William Barnes, trustee, sold at public auction, at the court-house in the city and county of Milwaukee, in said State of Wisconsin, all property, rights, privileges, franchises, things in action, and other things in said mortgage and supplementary mortgage to him, said Barnes, described; and the said William Barnes, trustee, then and there, at said sale, became the purchaser thereof, accord-
277 ing to the provisions of the laws of said State of Wisconsin then in force in that behalf, at and for the sum of one million five hundred and ninety-three thousand three hundred and thirty-three dollars and thirty-three cents ($1,593,333.33), no other person or body having made any bid whatever for the same, and that said mortgages thus became and were duly foreclosed, according to the provisions of the laws of the State of Wisconsin in that behalf then in force. And that said Barnes, by virtue of said purchase and the provision of the law of the State of Wisconsin then in force in that behalf, became the owner of the property and franchises and other things so purchased by him, and thereafter held the same in trust, and only in trust, for the holders of then outstanding bonds secured by said mortgages.

And that afterwards, to wit, on or about the 23rd day of May, A. D. 1859, the owners and holders of a large majority of the said bonds proceeded to organize anew, and then and there elected directors and took the corporate name "Milwaukee and Minnesota Railroad Company," and said Barnes then and thereafter conveyed to the said last-named

company all the property and things by him purchased as aforesaid; and thereafter said company proceeded and conducted its business under and in pursuance of the charter of the said La Crosse & Milwaukee Railroad Company, and thereby became and ever since have con-
278 tinued a corporation under and by virtue of the laws of said State, capable of suing and being sued; and that said Milwaukee and Minnesota Railroad Company immediately thereafter entered into possession of said property and franchises of said La Crosse & Milwaukee Railroad Company so far as the same were in possession of said La Crosse and Milwaukee Railroad Company at the time of said sale.

That said bondholders at said new organization elected and chose the following-named persons directors of said Milwaukee and Minnesota Railroad Company, viz: Russell Sage, N. J. Emmons, Hans Crocker, Wm. E. Smith, Lemuel W. Weeks, W. B. Gilbert, William Gould, William R. Sill and Buttershall, and that said directors immediately thereafter organized the said board of directors by electing and choosing Russell Sage president, N. J. Emmons vice-president, and Dwight W. Keyes secretary of said Milwaukee and Minnesota Railroad Company; and that neither the La Crosse and Milwaukee Railroad Company nor any subsequent encumbrancer, or encumbrancers, nor any other person or persons did, within one year after said sale, redeem, or offer to redeem, the property and things so sold under said mortgages or trust deeds, according to law in that behalf.

That by virtue of the said foreclosure of said deeds of trust or
279 mortgages to said Barnes, as hereinbefore set forth, and the organization of said Milwaukee & Minnesota Railroad Company, and conveyance by said Barnes, as hereinbefore set forth, and the said premises not having been redeemed, as hereinbefore stated, the said Milwaukee and Minnesota Railroad Company, from and after May 21st, 1860, became, under and by the laws of the State of Wisconsin, the successor of the La Crosse & Milwaukee Railroad Company, as to all the property and things described in said deeds, and the owner of, and clothed with, all the rights, privileges, and franchises and property, real and personal, and things in action, and effects of every nature and description, before then belonging to said La Crosse & Milwaukee Railroad Company, wherever situated and however circumstanced, subject only to such valid and legal liens and encumbrances thereon as were prior to said first deed to said Barnes; and that the said Milwaukee & Minnesota Railroad Company, being by law an incorporated company, composed of the creditors of the said La Crosse & Milwaukee Railroad Company, and purchasers at said foreclosure sale (in the manner hereinbefore stated), as corporators has a legal right to object to, resist, and set aside all conveyances, negotiations, sales, transfers, leases, mortgages, or judgments which were or have been made or suffered by
280 the said La Crosse and Milwaukee Railroad Company, with intent to hinder, or delay, or defraud its creditors, and has the right to object to, resist, and set aside every illegal, unjust, or fraudulent claim of any person or persons against the said La Crosse & Milwaukee Railroad Company, which is apparently a lien or incumbrance upon any of the property, rights, privileges, franchises, or other things whatsoever of said last named company which were embraced or described, or intended to be embraced or described, in either of said trust deeds to said Barnes, and now owned by said Milwaukee and Minnesota Railroad Company, as hereinbefore stated; and has the right to collect and enforce all actions and causes of action existing in favor of said La Crosse and Milwaukee Railroad Company, and conveyed by said trust

deeds to said Barnes, or either of them; that the said Milwaukee and Minnesota Railroad Company has, since its organization as aforesaid, continued a corporation under the laws of the State of Wisconsin, and has been recognized and its incorporation fully ratified by act of the legislature of said State, duly approved by the governor of said State, and still a law of said State, to wit, by chapter 28 of the private and local laws of said State enacted in 1862, entitled "An act in relation to a certain corporation election," approved March 6th, 1862.

281 This defendant, further answering, says that it is advised and believes, and thereupon submits to this honorable court, and insists that by law no one of said several judgments mentioned in said bill of complaint ever were a lien or encumbrance on any part of the property mentioned and described in said bill of complaint; but further answering, this defendant says that the said judgments in favor of said Litchfield, said Buton, said Justice, Cobb, Bean, Wilson, and Mitchell, and said Greenleaf, mentioned in said bill of complaint, were each and every of them rendered after the giving of said mortgage to said Barnes, dated June 21st, 1858, and that by the laws of the State of Wisconsin in that behalf in force at the time of the said foreclosure of the said mortgage to said Barnes, as hereinbefore stated, the said foreclosure extinguished all lien or encumbrance of each and every of said judgments mentioned in said bill of complaint, upon any of the property, real or personal, franchises or other things mentioned in said bill of complaint, even if this honorable court shall be of opinion that said several judgments were liens or encumbrances upon the same, or any part thereof, at the time when the said judgments were respectively rendered as aforesaid.

282 This defendant, on information and belief, further answering, says that it is not true, and it expressly denies that said mortgage or trust deed of the 21st of June, 1858, to the said Barnes, and the supplementary mortgage of the 11th of August, 1858, to said Barnes, or either of them, were issued in fraud of the creditors or stockholders of said company, or without authority of law; but on the contrary thereof, this defendant further answering as aforesaid, says that said mortgage to said Barnes were both issued bona fide and in pursuance of authority of law in that behalf, and that both of said mortgages to said Barnes were honestly issued in and about the necessary business of the said La Crosse and Milwaukee Railroad Company, and that both were necessary and proper to be issued by said last named company in and about the prosecution of its appropriate and legitimate and legal business.

And further answering as aforesaid, this defendant expressly avers that both of said mortgages were made, executed, and delivered by said last-named company for the purpose of securing its bona fide indebtedness and to raise money for its legal and proper use, as it was by law fully authorized to do, and denies that said mortgages or either of them were issued or made, executed or delivered for the purpose or with the design of bringing about a speedy sale of said road or its franchises or other thing or things, or for the purpose or with the design of

283 cutting off the stockholders in said company, or to hinder, delay, or defraud the creditors of the said La Crosse and Milwaukee Railroad Company, or passing the title and property in or to the said road or its franchises, or any part thereof, to any of the directors of said company, or their friends, or to any other person or persons, body or bodies corporate or politic whatever.

This defendant further answering, on information and belief, says

that it is true that on or about the 15th day of June, A. D. 1858, the said Gunnison, said Guest, said Noxon, Soutter, and Shears, five of the directors of the La Crosse and Milwaukee Railroad Company, at a meeting in Albany, New York, or elsewhere, which was subsequently and soon thereafter ratified by action of the board of directors in said State of Wisconsin, by resolution directed a modification of the bonds to be issued under said trust deed to said Barnes, so as to make the first instalment of interest payable on the 1st day of January, A. D. 1859, instead of the 1st day of July, A. D. 1859; but denies that said modification was made to enable them or any other person or persons to carry out any fraudulent design, or to enable them or any other person or persons to sell or cause to be sold the road and its franchises on
284 said trust deed, but says that said modification was made only for the purpose and with the intention thereby to make said bonds more available, and thus enable the said company the more speedily and readily to raise money by a sale of said bonds.

This defendant further answering, on information and belief, says that the La Crosse and Milwaukee Railroad Company through its directors, or by some of its officers, on or about the month of June, A. D. 1858, made a settlement with Selah Chamberlain of a claim made by him against said company, and gave him therefor the promissory note of said company for twenty thousand dollars, payable in two or three months thereafter, and agreed to deposit with him four hundred thousand dollars of the bonds secured by the said mortgage to said Barnes as collateral security, and did about that time deposit with him as aforesaid said bonds to the amount of two hundred thousand dollars, and paid him five thousand dollars in cash, which was raised by said company by hypothecation or sale of bonds secured by said Barnes' mortgages; and that in the month of October or November, 1858, the said company, by some of its officers or agents, delivered to said Chamberlain two hundred thousand dollars more of said bonds, as collateral security
285 to said twenty thousand dollar note as it had agreed to do as aforesaid; but denies that afterwards, on or about the 15th day of January, A. D. 1859, said bonds were divided up between the said committee mentioned in said bill of complaint, or their friends, or any other person or persons without being sold, as stated in said bill of complaint; but on the contrary thereof, this defendant, upon information and belief, further answering, says that the said Chamberlain was fully authorized to sell said bonds at the maturity of said twenty thousand dollar note, unless the same should then be paid, and at the maturity of said note the said company was greatly embarrassed and unable to raise the money to pay said note, and the said Chamberlain, by Meigs & Greenleaf, his brokers in New York, proceeded to the sale of said bonds, as he was authorized to do; and the officers of said company procured one or two postponements of said sale in hope of being able to raise said money and pay said note and reclaim said bonds, but the said company was unable so to do, and that thereafter, about the month of November, 1857, the said Chamberlain, by his said brokers, sold said bonds so pledged with him as aforesaid, as he was authorized to do in due course of business to bona fide purchasers; that said bonds were sold at very low rates in consequence of the poor credit of said company
286 and doubtful sufficiency of the security of said bonds; but that the sale of said bonds by said Chamberlain was open, fair, and honest, and that each and every of said bonds were sold for the best price and largest consideration that could be obtained therefor, and that the statements in said bill of complaint as to the dispositions of said bonds are untrue.

This defendant upon information and belief denies each and every allegation of the said bill of complaint, charging or stating that said bonds secured by said Barnes' mortgages, or any of them, were disposed of fraudulently, or with or for any illegal or fraudulent design or purpose; but on the contrary thereof, upon information and belief, says that each and every of the said bonds secured by the said Barnes mortgage was disposed of by said La Crosse & Milwaukee Railroad Company honestly and bona fide, and for the best possible interests of said company; and this defendant denies upon information and belief all unlawful combinations charged in the said bill.

This defendant upon information and belief admits that at a meeting of the directors, or some of them, at the city of Albany, New York, on or about the 13th December, 1858, after reciting that they had received
information from Milwaukee that a very large amount of the most
287 valuable property of said company in the city of Milwaukee, including its machine shops, engine houses, and repair shops, which had cost or was worth to the company one hundred and fifty thousand dollars, was in imminent peril of being lost, as stated in said bill of complaint, and that said company was destitute of the means to save said property from total loss, and that sales of property indispensible to the company had already been made, which might be redeemed; that said company had not until a then very recent date, been aware of the condition of the said property; and after reciting further, as stated in said bill of complaint, did pass the resolution in that behalf as stated in said bill of complaint; that the said recitals preceding said resolution, as stated in said bill of complaint, and admitted in this answer, were all true; that said recitals and resolutions were made and passed in good faith and for the best interests of said company, as the said directors then believed (and that said directors then believed all said recitals to be true, and that they were true), and not for any illegal or fraudulent purpose as stated in said bill of complaint; and that said resolution was subsequently ratified by said company by its board of directors in the State of Wisconsin.

This defendant, further answering on information and belief,
288 admits that the said La Crosse and Milwaukee Railroad Company, by its president, in or about the month of December, 1858, borrowed of William Gould the sum of twenty-five hundred dollars, and of William Watson the further sum of twenty-five hundred dollars, and gave its notes to them, respectively, therefor, payable in some short time thereafter, and deposited with each of said persons as collateral to the note of said company, bonds secured by said Barnes mortgages; and in like manner, and at or about the same time the said company borrowed of Seth R. Foster the sum of three thousand dollars, and of Henry G. Gilbert the sum of seven thousand five hundred dollars, and executed to said Foster and Gilbert, respectively, its promissory notes for the sums aforesaid, respectively, payable in a short time thereafter, and deposited with said Foster and Gilbert, respectively, as collateral security to said notes, bonds secured by said Barnes mortgages, the aggregate amount of about two hundred and ten thousand dollars; but this defendant on information and belief denies that the said notes, or either of them, were given, or said securities or any of them were pledged with any understanding between the directors or either of them, and the said Watson, Gould, Gilbert, or Foster, or any other person or persons,
that the said notes or either of them would not be paid at maturi-
289 ty, or that the said securities or any of them would not be redeemed by said company.

This defendant, further answering upon information and belief says, that the said money so borrowed by said company was borrowed by it in good faith, for its necessary use, and was by it used and employed about its proper and necessary legal business, and in such manner as the said company and its board of directors deemed for the best interests of said company; and denies as aforesaid that the directors, or any of them, ever confederated or combined together, or with any other person or persons, to defraud, hinder, or delay the creditors of said company, or any other person or persons, by borrowing said money or any part of it, as borrowed by it, or deposited said bonds or any of them, as security aforesaid; and denies that the said directors or any of them at the time they borrowed said money as aforesaid, or any of the persons from whom said company borrowed said money as aforesaid, intended that any of the said notes given therefor should not be paid at maturity, or that the said bonds should be sold and they be enabled thereby to purchase them or any of them at a nominal or other consideration, or know that any of said notes would not be paid at their maturity, or that it was not
290 necessary for said company to borrow said money upon such terms, or that the president of said company never intended to apply but about seven thousand five hundred dollars of said money to the purposes for which the same was borrowed as aforesaid, or that he, or any of the said directors appropriated any part of said money to their private or individual uses or purposes; but this defendant answering on information and belief, says that all said money so borrowed by said company was received by it through its officers, and by it applied to its necessary business, or the payment of its just debts, and that said company was enabled to, and did, by said money so borrowed, save property belonging to said company of value exceeding the nominal amount of said bonds so pledged as collateral security as aforesaid, which would otherwise have been entirely lost to said company.

This defendant, further answering on information and belief, denies that said Gould, Watson, Gilbert, and Foster, or either of them, were induced or solicited by said directors, or either of them, to divide said bonds among themselves, or any other person or persons, without offering said bonds for sale; and denies as aforesaid that the said Gould, Watson, Foster, and Gilbert, or either of them, did divide said bonds among themselves, or any other person, without a sale; but, on
291 the contrary thereof, the defendant, answering as aforesaid, says that at the maturity of the several notes given to the said Gould, said Watson, said Foster, and said Gilbert, as aforesaid, the said company was unable to raise money necessary to pay either of said notes, and that thereafter the said Gould, the said Watson, said Foster, and said Gilbert, respectively, proceeded to sell said bonds so held by them, respectively, as collateral security as aforesaid, and did, as they were respectively fully authorized to do, sell the same openly, fairly, and in due course of business, at and for the highest price which could be obtained therefor; and that all of said bonds had, before the foreclosure of the said mortgages to said Barnes, passed into circulation, and been sold and delivered from hand to hand in the stock markets of the United States, and that the said bona-fide holders of the said bonds held the same at the time of the said foreclosure, freed from any equitable defences (if any such there were) which might have been available between the original parties thereto.

This defendant, further answering on information and belief, says that all of the said bonds secured by the Barnes mortgage were legally sold or disposed of by said company, and in such manner as the then board

of directors of said company then believed to be for the best interests of said company, and that the said bonds were afterwards, and
292 at the time of the foreclosure (except about five hundred and fifty thousand dollars thereof, which were held by Stoddard Judd in trust for certain farm mortgage bondholders, creditors of said company) owned by bona-fide owners, who had received the same in due course of business; that said bonds were made negotiable, payable to the bearer thereof; that a substantial copy of said bonds is set out in the trust-deed, a copy of which is hereto attached, and marked Exhibit No. 1, and that said bonds had been freely sold, and passed from hand to hand in stock markets and in business transactions before the foreclosure of the Barnes mortgages; and this defendant is advised, submits to the court, and insists that the said bonds in the hands of such bona-fide holders were not at the time of said foreclosure, and are not now, subject to any equitable defenses which might have been interposed between the original parties thereto.

This defendant, further answering on information and belief, says that the said company paid out upon its just indebtedness of said bonds secured by said Barnes mortgages as follows, to wit: To W. & M. Sayles, 300 dollars; to R. S. Kneeland and others, for wood and bills payable, 7,103$\frac{3}{100}$ dollars; to Cyrus Hawley, 7,400 dollars; to D. H. Rockwell, Rockwell & Randall, 3,000 dollars; to Bissell and Earing, 300
293 dollars; to E. Cramer, 5,500 dollars; to C. J. Nazro & Co., 3,000 dollars; to J. S. Rockwell, 1,900 dollars; to D. W. Clark, 700 dollars; to H. J. Downes, 100 dollars; to Alexander Mitchell, 6,000 dollars; to T. J. Lewis, 1,800 dollars; to Garret Vliet, 800 dollars; to D. McDonald, 2,000 dollars; to Wm. E. Cramer, 500 dollars; to Caswell & Gaylord, 2,000 dollars; to C. R. Austin, 1,500 dollars; to C. D. Nash, 500 dollars; to H. Ludington & Co., 1,300 dollars; to E. D. Baker, 1,400 dollars; to G. D. Norris, 400 dollars; to G. D. Butterfield, 1,000; to S. A. Cole, 2,000 dollars; to W. H. Clark, 100 dollars; to James Cady, 500 dollars; to Barnet and estate of Rodden, 200 dollars; to Z. A. Cotton, 1,000 dollars; to Wisconsin Roofing Co., 400 dollars; to H. Williams, 500 dollars; to W. G. Gardner, 300 dollars; to W. G. Sterling, 600 dollars; to John Cramer, 1,000 dollars; to S. B. Scott, 1,500 dollars; to the Wisconsin Leather Company, 500 dollars; to Samuel Brown, 700 dollars; to Joseph Cary, 1,000 dollars; to A. F. Suelflohn, 800 dollars; to B. Crandall, 400 dollars; to Jonas Eaton, 900 dollars; to L. Comstock, 200 dollars; to Cyrus Hawley, for estate of F. M. Hawley, 3,000 dollars; to A. B. Van Cott, 1,000 dollars; to John P. McGregor, 2,000 dollars; to C. A. Sprague, 100 dollars; to N. Gerwold, 500 dollars; to N. B. Caswell, 600 dollars; to H. M. Griswold, 1,500 dollars; to Capt. L. H. Cotton, 700 dollars; to E. W. Dennis, for estate Watkins, 1,800 dollars; to R. S. Kneeland, for debts due sundry persons, 400 dollars; to E. D. Holton, 500 dollars; to Edward Por-
294 ter, 600 dollars; to J. H. Tweedy, 3,700 dollars; to Sholes & Simmons, 200 dollars; to A. S. Prichard, $2,000; to Russell Sage, 80,000 dollars.

This defendant, further answering, on information and belief, denies that the said foreclosure of the said Barnes' mortgages was had in pursuance of any fraudulent scheme, design, or purpose, as stated in said bill of complaint, or otherwise, but says, as aforesaid, that the said La Crosse & Milwaukee Railroad Company had become and was unable to raise money to pay the interest which had become due on said bonds secured by said mortgages to said Barnes, and that the

said Barnes thereupon proceeded in good faith to foreclose, and did foreclose, the said mortgages, as it was his duty to do.

This defendant, further answering, says that the said La Crosse & Milwaukee Railroad Company, during all the time within which it sold and disposed of said bonds secured by said Barnes mortgages, had authority by law to sell and dispose of its bonds at such rates and for such prices and at such discount as it thought for its own best interest; and that all of said bonds were sold and disposed of as said company and its directors believed for the best interest of said company.

295 This defendant, further answering, admits that it has not as yet been in actual possession of any part of said railroad or other property described in said bill of complaint, but says said railroad from Milwaukee to Portage City, together with the rolling stock and franchises thereto pertaining, are now held by a receiver of this court in a certain cause in said court pending, wherein James T. Soutter, survivor of Greene C. Bronson, is complainant, and the La Cross and Milwaukee Railroad Company, this defendant, and others, are defendants; that there is but four hundred thousand dollars, or thereabouts, now due the complainants in said cause, and this defendant expects and intends to pay that sum, procure the discharge of the receiver, and enter into possession of said rolling stock and franchises in a very short time, and use and operate the same as its own, as it has the legal right to do.

The defendant, further answering, on information and belief, says that it is not true, and it denies that the said Barnes, trustee mentioned in said bill of complaint, was ever advised of any fraudulent issue of any of said bonds, or ever confederated with the directors of the La Crosse and Milwaukee Railroad Company, or any other person or persons, for the sale of said road, or that the bonds for the payment of which the said road was sold, as aforesaid, or any of them,

296 were illegally issued and held by the said directors, or any of their immediate friends, or any other person or persons, on a mere nominal consideration, or that the same, or any of them, were fraudulent or void, and denies that the said road, rolling stock, and franchises were sold at the par value and interest, so as more effectually to prevent the stockholders of said company from redeeming the property from said sale, or to secure said road and franchises to any person or persons, or to defraud, hinder, delay, or defeat the said complainants, or any other person or persons, from collecting any claims against said company, said road, or property; but that said road, other property, and franchises were bid off by said Barnes at the price aforesaid, because, and only because, the said Barnes believed it to be his duty and for the best interests of said bondholders for him so to bid the same.

This defendant, further answering, says it has no knowledge or information sufficient to form a belief as to whether the directors of the La Crosse & Milwaukee Railroad Company issued to said Barnes any, or what amount of said bonds to compensate him as trustee, or for services in foreclosing said mortgages, or whether counsel employed to assist in said foreclosure were paid by said directors out of said bonds belonging to said company.

297 This defendant admits the appointment of a receiver (on the motion of said Bronson & Soutter, trustees) of the railroad from Milwaukee to Portage City, together with the rolling-stock and franchises pertaining thereto, and that the said receiver ever since has, or ought to have, held and operated the same, and received the tolls, rents,

and income therefrom; that the income of said premises has been large, but this defendant is as ignorant as the complainants say they are of what are the net earnings, but believes that the operating expenses do not equal one-half of the gross income; that true it is, as stated in said bill of complaint, that notwithstanding this large net income, the said receiver fails to pay the interest on said mortgages, and this defendant believes that said receiver in that cause and the said complainants in this cause are in fraudulent collusion to squander the said net income and sacrifice said premises by a sale, and that this defendant fully shares with the said complainants a just fear, and therefore admits that if said premises long continue in the hands of said court or its receiver the accumulations of interest will be great, and the fund nearly, if not quite, squandered; to prevent which this defendant intends to very soon pay and discharge all that is due on incumbrances prior to the date of the said Barnes mortgages, and enter into possession of said possessions.

298 This defendant admits that the said La Crosse and Milwaukee Railroad Company has ceased to exist, as stated in said bill of complaint, and this defendant therefore submits that it is not true, as stated in said bill of complaint, that the said last-named company is a corporation doing business in the State of Wisconsin.

This defendant, further answering, says the said William Barnes is now alive and a citizen of the State of New York; that this defendant is advised and submits to this court and insists that said William Barnes is a proper and necessary party to said bill of comp aint, and that the court cannot make any decree thereon without said Barnes being before said court as a party thereto; and this defendant here and now insists upon said objection to said bill, and prays that the same may be by said court declared defective for the non joinder of the said William Barnes as a party thereto, and that the same may be dismissed.

This defendant, further answering, says that it is advised, and submits to this court and insists, that the object of said bill of complaint is to perform in effect the office of an information or writ of quo warranto, and transfer to this court the jurisdiction of declaring against the right of this defendant to its corporate existence and franchises; and

299 this defendant prays the same benefit of this objection to said bill of complaint and the objection of non-joinder of said Barnes as if this defendant had insisted upon the same in a demurrer to said bill of complaint.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

[L. S.] THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY,
MATT H. CARPENTER,
Solicitor for said Company & of Counsel for said Company.

300 DISTRICT OF WISCONSIN:

Alexander Fleming, being first duly sworn, on oath says he is one of the directors of the Milwaukee and Minnesota Railroad Com.

said Barnes thereupon proceeded in good faith to foreclose, and did foreclose, the said mortgages, as it was his duty to do.

This defendant, further answering, says that the said La Crosse & Milwaukee Railroad Company, during all the time within which it sold and disposed of said bonds secured by said Barnes mortgages, had authority by law to sell and dispose of its bonds at such rates and for such prices and at such discount as it thought for its own best interest; and that all of said bonds were sold and disposed of as said company and its directors believed for the best interest of said company.

This defendant, further answering, admits that it has not as
295 yet been in actual possession of any part of said railroad or other property described in said bill of complaint, but says said railroad from Milwaukee to Portage City, together with the rolling stock and franchises thereto pertaining, are now held by a receiver of this court in a certain cause in said court pending, wherein James T. Soutter, survivor of Greene C. Bronson, is complainant, and the La Cross and Milwaukee Railroad Company, this defendant, and others, are defendants; that there is but four hundred thousand dollars, or thereabouts, now due the complainants in said cause, and this defendant expects and intends to pay that sum, procure the discharge of the receiver, and enter into possession of said rolling stock and franchises in a very short time, and use and operate the same as its own, as it has the legal right to do.

The defendant, further answering, on information and belief, says that it is not true, and it denies that the said Barnes, trustee mentioned in said bill of complaint, was ever advised of any fraudulent issue of any of said bonds, or ever confederated with the directors of the La Crosse and Milwaukee Railroad Company, or any other person or persons, for the sale of said road, or that the bonds for the payment of which the said road was sold, as aforesaid, or any of them,

were illegally issued and held by the said directors, or any of
296 their immediate friends, or any other person or persons, on a mere nominal consideration, or that the same, or any of them, were fraudulent or void, and denies that the said road, rolling stock, and franchises were sold at the par value and interest, so as more effectually to prevent the stockholders of said company from redeeming the property from said sale, or to secure said road and franchises to any person or persons, or to defraud, hinder, delay, or defeat the said complainants, or any other person or persons, from collecting any claims against said company, said road, or property; but that said road, other property, and franchises were bid off by said Barnes at the price aforesaid, because, and only because, the said Barnes believed it to be his duty and for the best interests of said bondholders for him so to bid the same.

This defendant, further answering, says it has no knowledge or information sufficient to form a belief as to whether the directors of the La Crosse & Milwaukee Railroad Company issued to said Barnes any, or what amount of said bonds to compensate him as trustee, or for services in foreclosing said mortgages, or whether counsel employed to assist in said foreclosure were paid by said directors out of said bonds belonging to said company.

297 This defendant admits the appointment of a receiver (on the motion of said Bronson & Soutter, trustees) of the railroad from Milwaukee to Portage City, together with the rolling-stock and franchises pertaining thereto, and that the said receiver ever since has, or ought to have, held and operated the same, and received the tolls, rents,

and income therefrom; that the income of said premises has been large, but this defendant is as ignorant as the complainants say they are of what are the net earnings, but believes that the operating expenses do not equal one-half of the gross income; that true it is, as stated in said bill of complaint, that notwithstanding this large net income, the said receiver fails to pay the interest on said mortgages, and this defendant believes that said receiver in that cause and the said complainants in this cause are in fraudulent collusion to squander the said net income and sacrifice said premises by a sale, and that this defendant fully shares with the said complainants a just fear, and therefore admits that if said premises long continue in the hands of said court or its receiver the accumulations of interest will be great, and the fund nearly, if not quite, squandered; to prevent which this defendant intends to very soon pay and discharge all that is due on incumbrances prior to the date of the said Barnes mortgages, and enter into possession of said possessions.

298 This defendant admits that the said La Crosse and Milwaukee Railroad Company has ceased to exist, as stated in said bill of complaint, and this defendant therefore submits that it is not true, as stated in said bill of complaint, that the said last-named company is a corporation doing business in the State of Wisconsin.

This defendant, further answering, says the said William Barnes is now alive and a citizen of the State of New York; that this defendant is advised and submits to this court and insists that said William Barnes is a proper and necessary party to said bill of comp aint, and that the court cannot make any decree thereon without said Barnes being before said court as a party thereto; and this defendant here and now insists upon said objection to said bill, and prays that the same may be by said court declared defective for the non joinder of the said William Barnes as a party thereto, and that the same may be dismissed.

This defendant, further answering, says that it is advised, and submits to this court and insists, that the object of said bill of complaint is to perform in effect the office of an information or writ of quo warranto, and transfer to this court the jurisdiction of declaring against the right of this defendant to its corporate existence and franchises; and

299 this defendant prays the same benefit of this objection to said bill of complaint and the objection of non-joinder of said Barnes as if this defendant had insisted upon the same in a demurrer to said bill of complaint.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

[L. S.] THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY,
MATT H. CARPENTER,
Solicitor for said Company & of Counsel for said Company.

300 DISTRICT OF WISCONSIN:

Alexander Fleming, being first duly sworn, on oath says he is one of the directors of the Milwaukee and Minnesota Railroad Com.

pany, which is a corporation existing under the laws of the State of Wisconsin; that Moses Kneeland, the last president of said company, departed this life at Milwaukee, in said district, since the last meeting of stockholders of said company, and that said company therefore has no president at present; that this affiant is and for many months has been the agent of said company, to manage and attend to its litigation and particularly its defence to the bill of complaint in this cause, and therefore this affiant verifies the foregoing answer, which is subscribed by the solicitor of said company and sealed with the corporate seal of said company, on behalf of said company; and this affiant further says that he has heard read and knows the contents of the foregoing answer, and that the same is true of his own knowledge, except as to the matters and things stated therein on information and belief, and that as to those matters he believes it to be true.

A. FLEMING.

Subscribed & sworn to before me this 15th day of April, A. D. 1864.
A. SCOTT SLOAN, *Clerk*,
By JAS. McFARLIN, *D'p'y.*

301 Replication was filed to the answer and proofs taken, and on final hearing in the circuit court the bill was dismissed. An appeal was taken to the Supreme Court and the decree of the circuit court was reversed. The mandate of the Supreme Court was filed in the circuit court, and afterwards judgment was entered in said cause in the words and figures following, to wit:

302 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America, for the district of Wisconsin, begun and held according to law at the city of Milwaukee, in said district, on the second Monday (being the thirteenth day) of April, A. D. 1868; present the honorable Andrew G. Miller, district judge, presiding. On the thirtieth day of the said term, to wit, on the ninth day of July, A. D. 1868, the following proceedings were had, to wit:

FREDERICK P. JAMES, ABRAM M. BREWER, E. Bradford Greenleaf, Philip S. Justice, Elkanah Cobb, John V. Bean, Philip Wilson, & J. Howard Mitchell, *vs.* MILWAUKEE & MINNESOTA RAILROAD Company, La Crosse & Milwaukee Railroad Company, & Selah Chamberlain.	In equity.

This day came the complainants by their counsel, and this cause came on to be finally heard upon the pleadings and proofs pursuant to the mandate of the Supreme Court of the United States herein filed, and was argued by counsel.

And it appearing to said court that the several judgments mentioned and described in the said bill of complaint as belonging to said
303 several complainants were recovered as therein set forth, and were severally docketed so as to become liens on all the lands, tenements, real estate, and chattels real, including the railroad and its fixtures and appurtenances of the said defendant, La Crosse & Milwaukee Railroad Company, as of the day of the docketing of said judgments respectively, and that said judgments remain in full force, unreversed

and unsatisfied. And it further appearing that less than two hundred thousand dollars in amount of the bonds issued under the mortgage of the said La Crosse & Milwaukee Railroad Company to William Barnes were ever negotiated by said company to bona fide holders, and that the pretended foreclosure and sale of said premises under said mortgage by said William Barnes to said William Barnes was made in pursuance of a notice claiming that two millions of dollars in amount had been issued and were outstanding under said mortgage, and that seventy thousand dollars of interest was due thereon, and that said foreclosure proceeding was in other respects irregular and fraudulent, and that the present holders of said bonds and the stock of said Milwaukee & Minnesota Railroad Company into which some of said bonds have been converted, are not bona fide holders without notice (except as to said amount of about one hundred and fifty thousand dollars, and less than two hundred
304 thousand dollars above mentioned).

Therefore it is ordered, adjudged, and decreed that said foreclosure and sale of said Barnes' mortgage be, and the same hereby is, set aside, vacated, and annulled. And the said defendant Milwaukee & Minnesota Railroad Company is perpetually restrained and enjoined from setting up any right or title under it to the said railroad of the said La Crosse & Milwaukee Railroad Company, its rolling stock, fixtures, and appurtenances, or to any of the property, real, personal, or mixed of said railroad company or of the income of said railroad. That said mortgage so given by said La Crosse and Milwaukee Railroad Company be and remain, as a security for the bonds issued under it, in the hands of bona fide holders for value without notice.

And it is further ordered and decreed that the said several judgments of said complainants were valid and subsisting liens upon all the land, real estate, and chattels real of the said La Crosse and Milwaukee Railroad Company as of the date of the docketing of said judgments respectively.

And it is further ordered, adjudged, and decreed that all the right, title, interest, and claim which the said La Crosse & Milwaukee Railroad Company had on the 5th day of October, 1858, of, in and to said lands, real estate, and chattels real, including said railroad from
305 Milwaukee to Portage City, its fixtures and appurtenances, be sold at public auction by the marshal of said district of Wisconsin to satisfy said judgments, unless prior to such sale said defendants pay to said complainants or their solicitors, or to said marshal, the amount so as aforesaid adjudged due said complainants, with interest and costs up to the time of such payment; that said marshal give public notice of the time and place of such sale by publishing the same four weeks in some daily newspaper published in the city of Milwaukee. And that the complainants or any of the parties in this cause may become the purchaser; and that the said marshal, after the confirmation of such sale by the court, execute a deed or deeds to the purchaser or purchasers of the premises; and that the said marshal out of the proceeds of said sale retain his fees, disbursements and commissions on said sale, and pay to the complainants or their solicitors, out of said proceeds, his costs in this suit to be taxed, and also the amount so found due the complainants as aforesaid, together with interest thereon from the date of this decree, or so much thereof as the purchase money of the premises will pay on the same; and that the marshal take receipts for the amount so paid, and file the same with his report, and that he bring the surplus moneys arising from said sale, if any there be, into court without
306 delay, to abide the further order of the court.

And it is further ordered, adjudged, and decreed, that the defendants, The Milwaukee & Minnesota Railroad Company and The La Crosse & Milwaukee Railroad Company, and all persons claiming or to claim from or under said defendants subsequent to October 5th, 1858, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said railroad, rolling stock, franchises and appurtenances, and every part and parcel thereof, and of all said lands and tenements.

A. G. MILLER.

Which said record was read in evidence.

Said plaintiff, by his said counsel, further offered in evidence the record of the judgment of Newcomb Cleveland against the La Crosse Company, together with a bill in chancery filed on the 31st day of October, 1857, by Newcomb Cleveland against the La Crosse & Milwaukee Railroad Company and said Selah Chamberlain.

This was a bill filed by Newcomb Cleveland, alleging the recovery of a judgment on the 7th day of October, 1857, in the district court of the United States for the district of Wisconsin, against the La Crosse & Milwaukee Railroad Company, for the sum of $112,271.76; that an execution had been issued on said judgment, and by virtue thereof
307 the marshal had levied upon the La Crosse & Milwaukee Railroad, and all its real estate and property, and that the defendant Selah Chamberlain was in possession of said property under a lease, which lease it was alleged, was made with the design and intent to injure, delay, cheat, hinder and defraud said Cleveland out of the said debt; and praying among other things, that the said lease to said Chamberlain might be declared illegal and void as against the said Cleveland, and further alleging that for a like purpose, and with a like intent to hinder, delay, cheat and defraud the said Cleveland, the said La Crosse Company fraudulently confessed a judgment in favor of said Chamberlain, without service of process or suit brought, for the sum of $629,105.22, which was docketed so as to become a lien upon the property, prior to the lien of the said Cleveland's judgment; that said Chamberlain appeared and answered said bill; that such proceedings were had in the said suit upon the bill, answers and proofs, that a decree was made in said cause, in the words and figures following, to wit:

On the 21st day of said term, to wit, on the 11th day of February, A. D. 1859, the following proceedings were had, to wit:

NEWCOMB CLEVELAND
vs.
308 THE LA CROSSE & MILWAUKEE RAILroad Company, Byron Kilbourn, James Ludington, D. C. Freeman & Selah Chamberlain. } In equity.

This day came the parties by their counsel, and on due consideration of the pleadings, proofs and arguments of counsel, it is thereupon ordered, adjudged and decreed by the court, that the articles of agreement between the La Crosse & Milwaukee Railroad Company and Selah Chamberlain, bearing date the twenty-sixth day of September, eighteen hundred and fifty-seven, whereby said company sold and assigned to said Chamberlain all its personal property, except such as is used on the Milwaukee & Watertown Division of said railroad, and leased to said

Chamberlain their said railroad and appurtenances, rights, franchises and privileges, be and hereby is vacated, annulled and made void, so that the same shall not hereafter be of any force or effect whatever. And that the said Chamberlain be, and hereby is, perpetually enjoined and restrained from using, managing, running, controlling, or meddling with said railroad or the rolling stock, personal property, or any of its appurtenances or franchises, or anything connected therewith under or by virtue of said articles of agreement.

309 And it is further ordered, adjudged and decreed by the court that the judgment of the said Selah Chamberlain against the La Crosse and Milwaukee Railroad Company, entered in this court on the second day of October, eighteen hundred and fifty-seven, for the sum of six hundred and twenty-nine thousand and eighty-nine dollars and seventy-two cents, and all executions and proceedings thereon, be and hereby are vacated, annulled, made void and set aside, so that the same shall have no further effect whatever.

And it is further ordered, adjudged and decreed by the court that the said defendant, Selah Chamberlain, pay the costs to be taxed, so far as they accrued in this proceeding against him; and that he pay the same within twenty days, or in default thereof an execution be issued against him for the same.

And as the lease and assignment of the said company to D. C. Freeman has expired by its own limitation, it is further ordered, adjudged and decreed by the court that the defendant, D. C. Freeman, pay the costs to be taxed, so far as they accrued in this proceeding against him, within twenty days, or in default thereof an execution be issued against him for the same.

And it is further ordered, adjudged and decreee by the court that the La Crosse and Milwaukee Railroad Company pay the costs to be taxed,

310 so far as they accrued in this proceeding against it, within twenty days, or in default thereof an execution be issued against it for the same.

And it is further ordered that reference be, and hereby is, made to a master of this court to ascertain and report the annual income of the several lots described in the bill as having been conveyed to Moses Kneeland and James Ludington from the time of their said purchase, together with a statement of the interest thereon; and also to ascertain and report the amount of the actual cost of permanent improvements made on said lot by said Moses Kneeland and Ludington, together with interest thereon; and also the amount of liens and taxes on said lots that have been paid by said Kneeland and Ludington, or by C. D. Nash for them, together with interest on the same; and that this bill be retained for further decree and proceedings after the coming in of said report.

It is ordered by the court that in case of appeal by the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, or either of them, a bond to authorize a supersedeas shall be given and filed with sufficient sureties, to be approved by the court or judge, in the penal sum of one hundred and fifty thousand dollars.

A. G. MILLER.

311 Said plaintiff, by his said counsel, next offered in evidence copy of summons and complaint filed in the circuit court of Milwaukee County, wherein Frederick P. James was plaintiff, and the La Crosse & Millwaukee Railroad Company and others were defendants; which was commenced by summons dated July 14th, 1864.

The summons was served on the La Crosse & Milwaukee Railroad Company by delivering a copy thereof to Daniel Wells, jr., president of said company, and leaving the same in his possession, on the 3rd day of August, 1864. The complaint is in the words and figures following:

312 Circuit court, Milwaukee County.

FREDERICK P. JAMES
against
LA CROSSE & MILWAUKEE RAILROAD COMPANY, Milwaukee & Minnesota Railroad Company, Lawrence G. Graham, Donald D. Scott, Augustus Treadwell, Edwin Townsend, Henry L. Palmer, Ephraim Mariner, John Sercomb, Sebastian Knetzger, Frederick Lind, Newcomb Cleveland, Byron Kilbourn, George W. Chapman, Charles Zinn, John A. Tesch, De Witt C. Freeman, James Wolstenholm, Ebenezer Higgins, George R. Mowry, Henry K. Eastman, Henry L. Simonds, Edwin C. Litchfield, Theodric R. B. Eldridge, William Gemmell, Charlotte A. Quentin, August Sauthoff, Ann Higgs Turton, executrix of the last will and testament of Thomas Turton, deceased, E. Bradford Greenleaf, Rodger Rogers, William Bump, and Sarah J. Harvey.

The plaintiff, by Cary & Pratt, his attorneys, shows unto this court:

That the La Crosse & Milwaukee Railroad Company, defendant, is a corporation chartered by the State of Wisconsin, and duly organized under its charter, by which, among other things, it was duly authorized to build and construct a railroad from the city of Milwaukee to
313 the city of La Crosse, and that during the years from 1853 to 1858 inclusive, said La Crosse & Milwaukee Railroad Company built and constructed said road from the city of Milwaukee to the city of La Crosse. That the defendant, Milwaukee and Minnesota Railroad Company, claims to be a corporation organized under and by virtue of the laws of the State of Wisconsin.

That on the 12th day of June, 1858, the Mercantile Bank, a corporation duly organized and doing business under the laws of the State of Connecticut, in a suit prosecuted by it against the said La Crosse & Milwaukee Railroad Company, in the circuit court in and for the county of Milwaukee, by the consideration and judgment of said court recovered against said La Crosse & Milwaukee Railroad Company the sum of twenty-five thousand seven hundred and ninety-four dollars and fifty-four cents, damages and costs, which judgment was duly docketed on that day, so as to become a lien upon all the real estate owned by the said La Crosse & Milwaukee Railroad Company in the State of Wisconsin. That afterwards, and on the 7th day of June, A. D. 1860, an execution on said judgment was issued out of and under the seal of said court, directed to the sheriff of Milwaukee County, commanding him to levy the amount thereof out of the goods and chattels, lands, and
314 tenements of said defendant, La Crosse & Milwaukee Railroad Company; and that afterwards, and on the 6th day of August, 1860, said sheriff returned said execution with his return thereon endorsed as follows, to wit:

MILWAUKEE COUNTY, *ss* :

I certify that I could not find any property belonging to the within-named defendants, or either of them, whereof to make the amount of this execution, or any part of it; and return unsatisfied, August 6th, 1860.

A. J. LANGWORTHY, *Sheriff.*
By JOHN W. DUNLAP, *Deputy.*

That said judgment still remains in full force, unreversed and unsatisfied, and that there is now actually due thereon from said defendant, La Crosse & Milwaukee Railroad Company, the sum of twenty-five thousand seven hundred and ninety-four dollars and fifty-four cents, together with interest thereon from June 12th, 1858.

That on the first day of May, in the year 1858, one Sebre Howard, in a suit prosecuted by him against the said La Crosse & Milwaukee Railroad Company, in the circuit court for Milwaukee County, by the consideration and judgment of said court, recovered against said La Crosse and Milwaukee Railroad Company a judgment for twenty-five thousand five hundred and eighty-six dollars and seventy-eight cents for
315 damages and costs, which said judgment was on the same day docketed, so as to become a lien on all the real estate of said La Crosse & Milwaukee Railroad Company, in the State of Wisconsin; that afterwards, and on the 29th day of October, A. D. 1858, an execution on said judgment was issued out of and under the seal of said circuit court, directed to the sheriff of Milwaukee Co., commanding him to levy the amount thereof out of the goods and chattels, lands, and tenements, of the said La Crosse and Milwaukee Railroad Company. And that afterwards, and on the 18th day of March, A. D. 1859, said sheriff returned said execution with his return thereon endorsed, by which said return it appeared that the said sheriff had made, by a sale of certain real estate, the sum of eleven thousand four hundred and thirty-eight forty one-hundredths dollars on said execution, and that he could not find any other property, goods or chattels, lands or tenements, belonging to said defendant, La Crosse and Milwaukee Railroad Company, whereof to make the remainder of said execution, or any part of it, and, therefore, that he returned the same unsatisfied as to the residue.

That said judgment still remains in full force, unreversed, unsatisfied, and unpaid, except as to the said sum so made on the said execution, and that there is now actually due thereon the sum of fifteen thousand seven hundred and thirty dollars and forty-nine cents, together
316 with interest from the 18th day of March, A. D. 1859.

That on the 7th day of October, 1859, one Newcomb Cleveland, a citizen of the State of Illinois, in a suit prosecuted by him against the said La Crosse & Milwaukee Railroad Company, in the district court of the United States for the district of Wisconsin, by the consideration and judgment of said court, recovered against said defendant, La Crosse & Milwaukee Railroad Company, the sum of one hundred and eleven thousand seven hundred and twenty-seven dollars and seventy-one cents damages and five hundred and forty-four dollars and fifteen cents costs, which judgment was duly docketed on that day in the clerk's office of said court so as to become a lien on all the real estate owned by said defendant, La Crosse & Milwaukee Railroad Company, within the State of Wisconsin.

That said judgment still remains in full force, unreversed and unsatisfied, except that the following sums have been paid thereon by Hans

Crocker, receiver of said La Crosse and Milwaukee Railroad Company, on the orders of said district court made for that purpose, to wit:

April 22, 1861, the sum of $28,801.92.

June 29, 1861, the sum of $10,000.00.

July 18, 1861, the sum of $20,000.00.

November 28, 1862, the sum of $15,000.00.

217 And that there is now actually due thereon from the said defendant, La Crosse & Milwaukee Railroad Company, the sum of $76,493.31-100, together with interest thereon from the 28th day of November, A. D. 1862.

That each and all of said judgments have been assigned and transferred by the several owners thereof to said plaintiff, and that he is now the lawful holder and owner of each and every one of said judgments, and fully authorized to collect the same and receive the amount due on each and all of said judgments.

That the said La Crosse & Milwaukee Railroad Company is utterly and hopelessly insolvent, and has no property or means of payment of any kind or description except the railroad and rolling stock thereon so as aforesaid constructed by said company from Milwaukee to La Crosse, and upon which the said several judgments became liens at the time of the docketing of the same respectively as above set forth.

That, as this plaintiff is informed and believes, said railroad, rolling stock, fixtures, and franchises, and privileges of said company are not liable to sale on execution, and that the only way in which the lien of said judgments on said property can be enforced is by invoking the equitable powers of this honorable court, and that the plaintiff is remediless at and by the strict rules of the common law.

318 That the lien of said judgments as to all that part of said road lying west of Portage City, being one hundred and five miles thereof, has been barred and foreclosed by reason of a foreclosure and sale under a certain mortgage given by said La Crosse & Milwaukee Railroad Company to Greene C. Bronson, James T. Soutter, and Shepherd Knapp, which said mortgage bore date and became a lien on said road on the 31st day of December, 1856, and was given to secure four million dollars in amount of bonds issued by said La Crosse and Milwaukee Railroad Company, and covered all that portion of said railroad lying between Portage City and La Crosse; that said Greene C. Bronson, James T. Soutter, and Shepherd Knapp, on the 5th day of December, 1859, filed their bill of complaint on the equity side of the district court of the United States for the district of Wisconsin, which court had full jurisdiction of the subject-matter, against said La Crosse & Milwaukee Railroad Company and others, to foreclose said mortgage; and that afterwards such proceedings were therein had that on the 13th day of January, 1862, a final decree was entered in said cause, directing a sale of said mortgaged premises, and forever foreclosing and barring said La Crosse & Milwaukee Railroad Company and all persons claiming under them subsequent to said mortgage from all right and equity

319 of redemption in said mortgaged premises. That afterwards, and on the 25th day of April, A. D. 1863, in pursuance of said decree, said premises were sold by the marshal of said district, which sale was afterwards confirmed by the court; that on such sale William Wallace Pratt and William H. White became the purchasers thereof, and afterwards, in pursuance of the laws of the State of Wisconsin, organized the Milwaukee & St. Paul Railway Company, and thereupon conveyed said premises so by them purchased to said corporation so formed, and

that said corporation is now the owner thereof and in the possession and enjoyment of the same.

That the remainder of the railroad of the said La Crosse & Milwaukee Railroad Company, being that part between the city of Milwaukee and Portage City, commonly known as the east division of said railroad, a distance of ninety-five miles, is the only property out of which said plaintiff can hope to realize the amount of said judgments; and that said portion of said railroad is encumbered by the following mortgage liens, all of which are prior to the lien of said judgments of this plaintiff, to wit, a mortgage given by said La Crosse & Milwaukee Railroad Company to Francis A. Palmer, to secure nine hundred and fifty thousand dollars in amount of eight per cent. bonds of said company, of
320 which bonds eight hundred and eighty-six thousand dollars in amount are now outstanding and secured by said mortgage.

A mortgage given by the Milwaukee, Fond du Lac and Green Bay Railroad Company to the city of Milwaukee, to secure the payment of two hundred thousand dollars of city bonds loaned to said road (which last company was consolidated with the La Crosse & Milwaukee Railroad Company), all of which bonds are now outstanding and unpaid.

A mortgage given to the city of Milwaukee by the La Crosse & Milwaukee Railroad Company, to secure one hundred and fourteen thousand dollars in city bonds, loaned to said road by said city, all of which bonds are now outstanding and unpaid. A mortgage bearing date August 17th, 1857, given by the La Crosse & Milwaukee Railroad Company to Greene C. Bronson and James T. Soutter, to secure one million dollars of eight per cent. bonds issued by said company, upon which last mortgage four hundred thousand dollars of interest is now past due and unpaid.

That said Greene C. Bronson and James T. Soutter, on the 9th day of December, 1859, filed their bill on the equity side of the district court of the United States for the district of Wisconsin, against said La Crosse & Milwaukee Railroad Company, the Milwaukee and Minnesota Railroad Company and others, to foreclose said mortgage so as
321 aforesaid given to them, and that such proceedings were therein had, that on the 6th day of July, 1860, Hans Crocker was appointed receiver in that suit of the said La Crosse & Milwaukee Railroad Company from Milwaukee to Portage City, and that ever since said 6th day of July said Hans Crocker has been acting as such receiver, operating the said railroad and receiving the revenue, tolls, and income thereof; and that all of said revenue, tolls, and income (except the sum of about $) now remain in the hands of said receiver, and except, also, the sum of $73,801 $\frac{92}{100}$ so as aforesaid paid by said receiver on the judgment recovered by Newcomb Cleveland against said La Crosse and Milwaukee Railroad Company, have been applied and used in paying the operating expenses, necessary repairs, and renewals of said road and rolling-stock and the interest on the mortgages so as aforesaid given to Francis A. Palmer and to the city of Milwaukee, and that no portion of the interest on the mortgage so given to Bronson and Soutter has been paid by said receiver, and that there is no reasonable prospect that said interest so due on said mortgage or the said judgments of this plaintiff above named will be paid out of the revenue, tolls, and income of said road.

That the said mortgages above described embraced and were and are a lien upon all of the property, real and personal, of the said La
322 Crosse & Milwaukee Railroad Company, except such part as passed to the Milwaukee & St. Paul Railroad Company by reason

of said purchase under foreclosure sale on said mortgage to said Bronson, Soutter, & Knapp of said western division of said railroad.

That a great portion of the income of said road from Milwaukee to Portage City, commonly called the East Division, has heretofore been derived from the through business from and to La Crosse to and from Milwaukee, but that this plaintiff is informed and believes that the Milwaukee & St. Paul Railroad Company, the owners of the road from Portage City to La Crosse, have purchased the road heretofore known as the Milwaukee and Watertown, and more recently the Milwaukee and Western, and have nearly completed said line from Columbus to Portage, and from Milwaukee to the junction of the Watertown and Milwaukee and Prairie du Chien roads, thereby forming a direct line, owned by said Milwaukee & St. Paul Railway Company, from Milwaukee to La Crosse, and connecting at Milwaukee with the Chicago & Milwaukee Railroad. That, as this plaintiff is informed and believes, said road will be completed in the month of August next, and that thereby the gross income of said east division will be diminished nearly or quite one-half, so that this plaintiff will be entirely deprived of all pros-
323 pect of ever realizing anything on his said judgments from the revenue, tolls, or income of said road. And that there is no prospect that said plaintiff will ever realize payment of his said judgments in any other manner than by a sale of the said road, rolling stock, and franchises, by and under the direction of this honorable court.

That, as he is informed and believes, on the 21st day of June, A. D. 1858, the said La Crosse & Milwaukee Railroad Company executed to one William Barnes, as trustee, a mortgage on the whole of said railroad from Milwaukee to La Crosse, to secure two million dollars in amount of bonds; that some bonds were issued under said mortgage, but to what amount the plaintiff is uninformed; that afterwards, and on the 11th day of August, A. D. 1858, a supplemental mortgage was executed by said La Crosse & Milwaukee Railroad Company to said Barnes; that afterwards, and on or about the first day of February, 1859, the said William Barnes, claiming to act by virtue of the power contained in said mortgage and supplemental mortgage, caused said mortgaged premises to be advertised for sale in a public newspaper in the city of Milwaukee; and afterwards, and on the 21st day of May, A. D. 1859, at the court-house in Milwaukee, offered the same for sale, pursuant to said notice, at public vendue, and pretended to sell said
324 mortgaged premises to himself, and thereby claimed that he had become the owner thereof, in trust for the bondholders, and that thereby said mortgage was foreclosed, and that within one year from that time the equity of redemption of the La Crosse & Milwaukee Railroad Company would be entirely barred and foreclosed, unless it was redeemed from said sale; that after said sale some of the bondholders under said mortgage pretended to form a corporation, under and by virtue of the laws of the State of Wisconsin, by the name of the Milwaukee and Minnesota Railroad Company; that after the pretended formation of said company said Barnes pretended to convey to them the premises so purchased by him at said sale; and that thereupon said company, so formed, claimed to be a corporation duly organized; that it had succeeded to all the rights, privileges, franchises, and property which were of the La Crosse & Milwaukee Railroad Company on the 21st day of June, A. D. 1858, and that it was the owner of the equity of redemption of the premises so as aforesaid mortgaged to said Barnes.

That said plaintiff has heard and been informed that said mortgage, so given to said Barnes, was fraudulent; that said pretended foreclosure

was irregular and of no validity; that said purchase by Barnes was unauthorized, and that the title to said property never passed to said
325 Barnes or to said pretended Milwaukee and Minnesota Railroad Company, and that the equity of redemption is still in the La Crosse and Milwaukee Railroad Company; as to the truth of all which said plaintiff is not particularly informed, and therefore leaves said defendant, Milwaukee & Minnesota Railroad Company, to make such proof in the premises as it may be advised.

That said pretended Milwaukee and Minnesota Railroad Company have never had possession or control of said mortgaged property or premises, or any part or portion thereof; that whatever may be the rights acquired by said pretended Milwaukee & Minnesota Company by virtue of said mortgage, said foreclosure, sale, and purchase, and the formation of said pretended corporation, to said mortgaged property, they are subject and inferior to the lien, claim, and right of this plaintiff, by virtue of the lien of the judgments so as aforesaid recovered against said La Crosse & Milwaukee Railroad Company.

That all the other defendants named in this action except said La Crosse & Milwaukee Railroad Company and said Milwaukee & Minnesota Railroad Company are judgment creditors, the lien of whose judgments are subject and inferior to the lien of this plaintiff by virtue of his judgments as aforesaid.

The plaintiff therefore asks the judgment of this court for the
326 amount of said judgments with interest and costs, and that all and singular the right, title, and interest which the La Crosse & Milwaukee Railroad Company had on the 12th day of June, 1858, of, in and to the La Crosse & Milwaukee Railroad Company, between the city of Milwaukee and Portage City, its road-bed, rolling stock, fixtures, depots and depot grounds, car and machine shops, locomotive engines, and engine houses and furniture, and all and singular the rights, privileges, and franchises of said La Crosse & Milwaukee Railroad Company as the same existed and were enjoyed and possessed by said company on that day, be sold by and under the direction of this honorable court, and that out of the moneys arising from said sale the said plaintiff be paid the amount so found his due, and that the residue of said moneys be brought into court to abide its further orders, and that the purchaser at said sale be let into possession of said premises, and that said defendants, and all persons claiming by, through, or under them or either of them, be forever barred and foreclosed of and from all right or equity of redemption to said premises and every part and portion thereof; and that the said plaintiff may have such other relief and such further relief as may be meet and agreeable to equity.

CARY & PRATT,
Attorneys for Plaintiff.

327 STATE OF NEW YORK,
City and County of New York, ss:

Frederick P. James, of New York, being duly sworn, deposes and says that he is the plaintiff in the foregoing complaint named, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

F. P. JAMES.

Sworn to before me this 14th day of July, A. D. 1864.
[SEAL.] THO'S L. THORNELL,
Commissioner for Wisconsin in New York.

[U. S. revenue stamp, 5 cents, cancelled.]

328 Said complaint was read in evidence.

Said plaintiff, by his said counsel, next offered in evidence the record of the judgment recovered by Sebre Howard in the United States district court for the district of Wisconsin against the La Crosse & Milwaukee Railroad Company.

This suit was instituted on a judgment which had been recovered by Sebre Howard against said company in the circuit court of Milwaukee County for $25,586.78 damages and costs, and after the sale of the lands in suit on said judgment to recover the balance due on said judgment after such sale. And such proceedings were had in said suit that said Howard recovered judgment on the 28th day of November, 1859, for the sum of $16,379.86. Execution was issued December 9th, 1859, and was returned by the marshal with his return endorsed thereon "No property found."

Said plaintiff, by his said counsel, offered and read in evidence the record of a suit commenced on the equity side of the United States district court for the district of Wisconsin, in favor of Sebre Howard against the La Crosse and Milwaukee Railroad Company and Selah Chamberlain. This was a creditor's bill filed on the said judgment, seeking to recover the property of the defendant, the La Crosse and Milwaukee Railroad Company.

Such proceedings were had in the cause that a subpœna was
329 served on the La Crosse and Milwaukee Railroad Company by delivering the same to Newcomb Cleveland, president, on the 18th day of January, 1860.

JUNE 9TH, 1860.

Hans Crocker was appointed receiver by virtue of an order in said cause, and said defendant Selah Chamberlain was directed to deliver over to said receiver the La Crosse and Milwaukee Railroad and all its property.

JOHN H. ELSNER, called as a witness for the plaintiff, testified:

Reside in the city of Milwaukee, and have resided there since 1854. Am a surveyor. At the request of the plaintiff made the maps which have been referred to in the course of this trial by the plaintiff. Made the said maps from the deeds of Howard describing the premises. Have resided in the second ward in the city of Milwaukee since 1854, in the neighborhood of the grounds in question, and have been familiar with what is known as the La Crosse Railroad, within the city of Milwaukee. Made the maps about the 15th of October, 1875. The maps represent, all which is marked in red, outside of the line of the railroad track, called for or described in Howard's deeds. Made the maps from the descriptions found in the deed and made a survey of the lands in question. The map is a correct representation of the line of the
330 railroad and the lots and blocks in question at the time the same was made, to wit, the 11th day of October, 1875. They correctly represent the track as of that date. Made the map by measurements taken at the time, with the deed of the plaintiff before me, so that I knew the description of the lands the plaintiff claimed.

Was out of the city from 1862 to 1865, and was in the city in 1867. Lots 8, 9, & 10, in block 41, were vacant in 1867, but were used for discharging baggage, express, and mail-matter during that time. Third street is the name of the street on which the lots front; the black line represents the line of the lots on the street. Traveling north of the

depot building to Chestnut street, a portion of lot 5 was occupied by Wolcott (?) as a grocery store in 1867. The whole of it is marked on the map forty feet. The paint shop was included in the grocery store at that time. In 1867 the long brick building, three stories high, sixty feet front, was used for depot building. It was a place where passengers went in to get into the cars. I think there were some officers of the company in the building up-stairs. Passing from Allcott's, lots 1, 2, 3, & 4 were vacant from that building up to Chestnut street. I don't know of any portion of lots 4, 3 & 2 being used for any purpose connected with the railroad. During 1867 they used a portion of lot 1,
331 corner of Chestnut and Third street, for the delivery of baggage; the baggage-master's office was there. Lots 4, 3, & 2 were not entirely vacant; there were some buildings on them, a barber shop and a shoe shop, in 1867. Those lots were never used for railroad purposes. In 1867 I think those portions of lots 8, 9 & 10, in block 41, on which is marked "Open dock yard," fronting on the river, was used for shipping ore and receiving posts and ties, &c., from vessels. That was used for that purpose at the time the road was built. Saw it used for landing cars and engines. I think Higby's elevator was put up in 1859, that is, a portion of it; I don't know whether it was finished. The street north of Higby's elevator is Chestnut street, and is eighty feet wide. The lot on the corner on the west side of the railroad tracks was occupied in 1867 by a wooden building, and as a jeweler's store. A story and a half wooden building was east of the jeweller's store; it was there in 1867. I could not say how it was occupied in 1867. Passing to the next lot north, lot 9, a portion of that lot is occupied by wood sheds that I would not say was there in 1867; might have been there; I would not swear to it. I suppose it has been used the same since 1867 as then, for the storage of old boxes and barrels. There was a drug store on it before 1867, a brick building occupied as a drug store. It was used for
332 a store, wholesale paints, &c. The next little brick building takes in a portion of lot 8. It is properly described on the map. That gives the property accurately, from what I supposed to be the line of Chestnut street. That brick building stands on the corner of Chestnut street. Lot 8 in 1867, I think, had tracks on it as represented on that map now. That is intended to represent the side track. I think the premises east of the track were occupied by the Northern Transportation Company for receiving and transferring goods; that is, a portion of it.

Tibbits & Starkweather were known as the agents. The map represents their warehouse. This entire line from Chestnut street to the south line of lot one, passing until we get to *to* block 33, I think was used and occupied by a warehouse. I could not be sure. I think there is a warehouse on block 33, at any rate on the north side of it. A portion of lot 3 is used by the engine-house of the city. I think a portion of the land in block 33 was used in 1867 for a warehouse. The Horicon freight depot is, I think, correctly represented on the map. West of the side tracks, in the lots 3, 6, 7, there was nothing. The character of the land is pretty level through that block 30. I was familiar with that block in 1867. I might say I was over it every day. I would
333 not swear that there was a frame house on that lot in 1867; it might have been there was. I think there was a blacksmith's shop there in 1867, but in regard to the house I never paid any attention. The map substantially describes the location of the blacksmith's shop, and accurately from the supposed line of the alley. The line of the railroad as it crosses the corner of lot 22, block 16, is represented on the

map. The slope of the land is towards the west, gradually running up. In 1867 it was used for a lumber office by Gunyon. It was not used for railroad purposes in 1867 other than as represented by the track here on the map. The piece in block 21 described as follows: "This lot was all occupied by an old freight house now used as a storehouse for wheat, &c."; was used for the same purpose in 1867; it was used for freight depot at that time, in connection with the railroad and by the railroad company. The blue line represents the canal. Lots 7 & 8, block 13, I don't think were used by the railroad company, but how they were used I don't know; a portion of them was a garden. The character of the land is a little flat; the railroad track passes on an embankment 12 or 15 feet high. It is substantially the same with lots 1 and 4. I think
that they were used for the same purpose north of the track as
334 they were south, to wit, for gardening. Lots 1, 3 & 4, block 1,
were not used by the railroad company at all. The lay of the land there is a high bank, and runs from the canal, I should judge running down toward the canal 20 feet, sloping east. The track is twenty feet higher than the canal. These three lots have never been used; the track runs through a cut of about twelve feet.

In 1867 none of the strip east was used at all, except a strip about twenty feet east has been graded out for another side track. The east of that has never been used, and was not in 1867. The cut does not seem to be more than 3 or 4 feet through the reserved acre. It looks as though it had been graded off; what for, I don't know. The side track ran through it in 1867. I should think the side tracks there were about twenty feet in width, the way it is graded. I dont think the balance of it east was used for anything. I don't know of the railroad using it for any purpose. The blue line here represents the line of the canal. Block 48, I think, was in 1867 and is used now for railroad purposes. The memorandum on that is not as it ought to be. This is on a slope running down to the canal. I think it is not necessary in order to support the track. Lots 7 & 8, or a portion of them, were used, I suppose,
for the slope of the cut. It is a very steep side-hill cut where the
335 railroad passes through. Pretty nearly all of the eastern portion
of these lots lie in the ravine. I suppose that so much as is indicated by the line is used for the slope. The line of road runs through here on a side hill, and they have to use enough of this land so as to give their cut the right slope. I should think the railroad would have used all of lot 8 and a portion of lot 7 to get a sufficient slope to protect the track. The east half of lots 5 & 6, I don't think they were used for this purpose. The railroad does not touch this anywhere. I recollect the wood-shed as being there in 1867, and it is there to-day, and was there at the time I made this map, and the map correctly represents the location of the wood-shed with reference to the tracks. The black line represents the fence. There is a fence all the way around this tract. I think there was in 1867. The property east of the black line was used in 1867 for gardening. I don't know that any portion of that which is marked in red, east of the black line, was used for railroad purposes in 1867. I do recollect of some cattle-yards, commencing from Humbolt avenue. I could not say whether these cattle yards extended any further than to the red line. The distance from the red line to Humbolt avenue is somewhere about 167 feet. I could not state definitely whether the
336 cattle yards came further than to the place marked red on the
map. As to that portion which is marked red on the map, it was not used for railroad purposes in 1867. As to all of the tract west of the line of the road, I don't think it was used in 1867 by the railroad any

further than on the end nearest Humbolt avenue. It was used for piling wood. The width of the line is thirty feet on the lower end and sixty feet on the upper.

Cross examination:

I do not call myself a civil engineer; I call myself a surveyor. Have been employed on the Milwaukee & Northern Railroad. I made my measurements with a chain, but I assumed certain corners as points, and from those corners took my measurements. The map is measured from the quarter-section quarter. The distance from the main track at the south end of the line on the map which has endorsed upon it "This tract has always been vacant" is thirty feet. That would give at that point the whole ownership of the right of way thirty feet in width from the center line of the main track. At the north end of the same track it would be about sixty feet; so that the right of way of the railroad from the center line of the main track to that point would be about thirty feet at the south end and about sixty feet at the north
337 end. I know generally the width of the right of way of railroads. In this country it is one hundred feet—fifty feet each side of the center line, where the ground is level and fair; and in other places, where it is cut and filled, it sometimes requires more width, that being according to the size of the cut or the fill.

Thereupon said defendant's counsel propounded to said witness the following question: What is the usual width of right of way of railroads, exclusive of their depot grounds?

To which said question said counsel for the plaintiff did then and there object, as irrelevant, immaterial, and incompetent; that the question should be, what was necessary and proper for the right of way of the line of the road in the condition in which the line was at the particular point inquired about. Objection overruled, question allowed; and to which ruling said plaintiff, by his said counsel, did then and there except.

And the witness answered: There are different widths. The right of way, as far as we used it on the Northern road, was fifty feet on each side of center line; and for the depot grounds for station buildings generally had fifty feet outside of the side track, the side track being about thirty or forty feet from the center line of the main line. The station grounds depend altogether upon what the station is, how
338 many side tracks, and how much business is done at that point. The balance of the lands on this tract gradually slope down towards the canal. I should judge that it is about two hundred feet below the side track to the canal. I should think the side track is from fifteen to twenty feet higher than the canal above the water of the canal. The map is a scale of thirty feet to the inch; two hundred feet would be almost seven inches. I don't know whether these buildings were on this tract in 1867. The company have been in the habit of using that portion inside of the fence line for piling wood. I can't say how far the cattle yards came. I don't think they extended down to the canal. I don't recollect distinctly how the fact was. I am certain that so much as is shown by the white spot on the map was used for cattle-yard. I am sure I have the track placed on the map at the right place according to the measurements. As I stated before, I did not make any survey, and did not take any instruments down there. The line may run more north through the center of the lot; as I stated before, the railroad is built on a side hill; the ground formerly, I suppose, was running down towards the canal very abruptly. I should say

they would have to use all of lot 8 and part of lot 7, and the slope
339 would not take more than half of lot 7. I don't think the slope does take more than half of lot 7. The land is twelve or fifteen feet above the track and still rising, and is straight up until you get on to a portion of lot 6. It ought to have at least fifteen feet, I think, to make the slope right. I don't think that would use up all of lot 7; it would save a little corner on one side on the side hill. They would have to use perhaps a portion of lot 6, in order to make their embankment, as the embankment is there. That lot was necessary for the slope. It does not appear to me that the reserved acre was a gravel-bed; gravel has been taken off of it, about twenty feet from the side track. I should judge it is from five to six feet above the track. I know there was a side track in there in 1867. I don't think there was more than one. I had nothing to do with the railroad in those days. I am speaking from what I have seen and recollect. I passed that way very often. I had no interest in it. I could not tell how many tracks, nor in what shape, nor how they were used. It is nine years since that time. There was nothing to fix it in my mind, any more than any other matter in the city that did not concern me at all. I should think that cut was about twelve feet deep.

340 And thereupon said defendant's counsel propounded to said witness the following question: Take this property, you say it is gravel, if you were engaged in getting the right of way for this road, would you have considered it necessary for the use of the road to acquire what property there is there—what is here colored on the map of the railroad company—at that time? What was necessary for the use of the road at that point?

To which said question said counsel for the plaintiff d'd then and there object as irrelevant, incompetent, and immaterial, which objection was overruled, and to which ruling said plaintiff, by his said counsel, did then and there except.

And the witness answered. I should consider a portion of it as necessary, but not a portion of lot 3. I would say that there you would only need to get the right of way. It depends altogether upon what the general rule is. If you are getting it one hundred feet in width, it would take it, and my opinion would be that all of it would be necessary to have obtained, if you were getting a right of way one hundred feet in width. I would not say it would be necessary for the right of way, but for the use of the road. I think there was a track running through a portion of lots 5 & 6, block 30, running up to the Hori-
341 con freight house, lots 6 & 7, or at least lot 7, was used to get up to the depot. I think the whole of it has been used for the purpose of approach to the depot. The blacksmith shop belonged to the company. I suppose these lots were left open for the purpose of approaching the depot. The teams would generally approach from Third street. It would be more convenient to come from that direction than to come around Cherry street. I don't think all that property would be necessary for the successful transaction of the business and operation and use of that property. If I could give a right idea of where this other side track came in, I should say it would be advisable to have a street open. I should have an opening through to Third street along through the alley. That is sufficient to get in there. I don't know of that property having been used from the time that the road was constructed through to 1867, for the purpose of piling lumber, ties, telegraph poles, and iron, &c. I never saw anything there. I have seen some boards in the corner, but nothing else. I saw some iron rails

right where you locate the road, a little outside of that location. The blacksmith shop was used for repairing frogs, &c. It would certainly be necessary to have a thoroughfare to get down from the tracks to the blacksmith's shop.

342 I could not say whether the warehouse on block 40 was used in 1867 by the company or not. It was used by the Northern Transportation Company to land freight there, whether the company ran it or not I can't say. The boats of the Northern Transportation Company came in there and delivered their freight. The railroad came in on the west side of the freight house. I don't know anything about whether it was exclusively in the use of the company and under their control. It was occupied by Tibbits as a place for the deposit of goods from the boats that were to go over the road, and to receive from the railroad merchandise and property that was to go on the boats. I think it was so used all the time that Tibbits was there, but whether it was so used all that time I do not know. I think the lot on Chestnut street was used for the purpose of receiving baggage and loading it into the cars. Teams did drive there in 1867. The whole of the space from Chestnut street to the depot building was open, but in the summer time portions of it were used for nursery trees which came in and were sold there. They used that space as a kind of a market for such trees. They brought them in the spring and sold them in the summer. I have known them to be there some-

343 times up to August; sometimes it was not quite so long as that before they were taken away. Trees were set out in the ground and kept there until they sold them. I think the trees were green when they took them away. It was an open space.

Redirect examination:

Lot 1 is forty feet front on Third street, and is a corner lot.

Recross-examination:

A couple of little buildings were on the corner; one was a barber shop, frame building or board shanty. I think they were removed in the fall of 1868. I can't tell when they were put up; they were there in 1865.

Redirect examination:

The front is forty feet. I could not say what the width of the track or right of way was here in the city. I don't think that railroads take one hundred feet in width for their main line in passing through the populous part of a city.

344 CHARLES HOWARD, being sworn, says:

I am the plaintiff in this suit and know the property in question. My whole life has been devoted to commercial business. I have been for the last forty-two years in connection with my brother engaged in building and constructing railroads. Built a part of Baltimore & Washington Railroad; built a portion of the Wilmington & Susquehanna Railroad; built a portion of the Cleveland & Toledo Road; did a portion of the work of grading and laying the superstructure of the Erie & Pittsburgh, also the Detroit & Milwaukee Railroad and other roads. It has been the business of my life. We had a contract to construct the Watertown & Madison Road in Wisconsin. We built the New Albany & Sandusky Railroad. Am familiar with the running and operating of railroads. For some time I had the transfer and charge of the Detroit & Milwaukee Road at Detroit. I had the eastern terminus of that road for three years; laid out the tracks to the depots to get into and out of our warehouse. I have not been over the whole line of what

was formerly known as the La Crosse Railroad, from Milwaukee to La Crosse. I have been over so much of that line as is within the city of Milwaukee up to the round house and a little beyond. I have
345 been over that portion of the line very often since I bought it. I am not sure whether I was over it in 1867 or not. I am a little mixed as to the dates. I was there about that time; I could not get at it within a year. I have been over the road since I bought it in 1861, that is, over the parts we bid off, as often as once in two years. I was over it recently. I spent a good deal of time on it, and measured it and platted it; at first on a small scale and then I employed a surveyor to go to work and measure it regularly and make a survey. I merely took a tape line and a boy with me, and went over it and got an approximate map. I have run engines and invented engines. The Howard engine is my own engine, and we have always owned a large train of cars. I have been over the line as it is represented on this map. I know the track and the lands which lie west of it (said tract being the lands east, of Humbolt avenue). I have been very carefully over it, and measured it with a tape line and been off and on it with a surveyor. I know the main line of the road on that tract. All the engine houses, round houses car houses, repair shops, are beyond Humbolt avenue and are not shown on this map. I claim no title to any of that property. I think part of the land west of the railroad track is necessary. There should be land enough to support the track, and a side ditch is necessary. I
346 should think twelve feet from the outside of the rail would be sufficient. That gives a walk so that persons walking between that and the fence could not be in danger.

The balance of that tract this side of the line, twelve feet west of the west iron rail, was not necessary in 1867 for that road. I think all of the line east of the main line down to the black line would be necessary for the purposes of the railroad; the whole of it from the line down to the fence. I have been there almost every two years. I am speaking of the land from the black line on the map down to the canal. The railroad could not use those lands, unless to turn cattle in on the side hill. It is a steep hill. I do know of the road having had a cattle yard from Humbolt avenue. I have seen them; part of them are fenced. I never saw any part of those cattle yards on any portion of the lands marked in red. I don't know whether any part of the ground so marked was used in 1867 for cattle yards. I have seen wood piled on all of the lands between this track and the fence line. The black line is the present fence. It is difficult to walk up and down the slope from that line to the corner. I have known houses on that land since I bought it, in 1863. They have been occupied from that time up to 1867 as residences; always been occupied as residences, and the soil has been used for gar-
347 dens, with the exception of, I should think, forty feet, which has been taken and used for a borrowing pit, on what is known or called the reserved acre. The balance, I should say, was not necessary for any railroad purposes at that point. In my estimation, the top of the slope is about forty feet from the track. Lot 1, block 48, is entirely off of the road, except that the road just crosses the corner; entirely useless except twenty or thirty feet. As to block 33, the lower part of it is pretty high. The road goes along under the side of the hill, and after passing the lot there is quite a high embankment. There is no necessity for it; the road could not use anything on top of the hill. The land as it is is not sloped, excepting where it goes into the embankment. There is not over thirty feet of it but stands just as nature made it. I hould think thirty feet would be sufficient for the slopes in that block.

The slope stands naturally there. I think thirty feet from the west rail of the west track would be ample for the slope. The land east of the track in block 1 lies a good deal above the track. There is no necessity of over thirty feet there. It is no necessary for the road, and was not necessary in the construction of the road, to have the entire piece of property east for the purpose of the support of the road-bed. Going west of that tract, I should think thirty feet
348 west of the west rail would be ample for the uses of the road at that point. The track in block 13 is about, I should think, fifteen feet above these lots. These lots are occupied as gardens; they lie about fifteen feet below the track. I should think a fifteen foot embankment would require one and one-half the height. There would be no benefit to the railroad for the balance of that tract beyond the thirty feet, and I think no necessity. The next tract is occupied by gardens. I make the same rule as to the necessity there. All beyond thirty feet is not necessary. I think lots 10, 11, and 12, in block 30, are necessary for railroad purposes; fronts on Second street. Lot 16, block 22, I should think about thirty feet off from the corners is all that is necessary, as it is laid out there. The balance, I should think, was not necessary.

Ques. What was the necessity of locating a blacksmith's shop at the point shown on the map, taking the railroad property just as it is, for the uses and purposes of a railroad?

(Which question was objected to by the counsel for the defendant, and the court ruled that the witness should be confined to the question of giving his opinion as to whether it was necessary and proper for the use and enjoyment of the road, and with that addition the wit-
349 ness might answer it. To which said ruling and decision of said judge said plaintiff by his said counsel did then and there except.)

The witness answered: I think there was no necessity of it at all. There are plenty of other places nearer the road. The nearest point to the railroad track would be about fifty feet. Lots 6 & 7 have been vacant lots ever since I bought the property. If the company should need more than twenty feet they should take it off of the lot and widen the alley, and go through the alley. I should think there ought to be twenty feet more taken off the lot for that purpose. That would give them a street forty feet wide. Block 33, there was a railroad track running on the west side of that lot. They had a building there, and they used it for railroad purposes. Part of it has been used, I don't know how much of it, and it was at that time necessary. I should think that the property marked as the warehouse in block 40 was necessary. The Higby elevator has been used for that purpose. I think the railroad company needed all that river front. I think the three lots south of it were necessary for landing goods and property. I think the company would need about fifty or sixty feet west of the railroad tracks in lot' 10, 9, and 8. As to the balance of it over that fifty feet, I should
350 say it was not necessary for the successful operation of the road, taking the description of the depot buildings as it is.

Cross-examination:

The building on the map shown me is the passenger depot. Trains coming in head first bring the locomotive beyond that building. I say that it is not necessary, all of it. That part north of the buildings is not necessary for the uses of the railroad. Trains, when they come in, would have the baggage car and express car beyond the passenger-

building. I should say that your train could be run to the end of the block, but I do not think you would need all the lots, in order to receive or discharge your baggage. You could build a platform, and run the baggage on the platform to Chestnut street. The platform is fifteen feet wide, and is a good wide platform. I say it was not necessary to have the lots north; you could get out at any point you please, on a platform fifteen feet wide, and a street at each end is ample room for egress; that is my opinion. I think there was a vacant space on these lots, where baggage was discharged. I don't think it was the only place where baggage could be discharged. I think it could have been
351 discharged upon a narrow platform running out toward Chestnut street. I think baggage was unloaded in the vicinity of this property. I give it as my opinion that it was unnecessary to have that property for that purpose. It is very different in the city from in the country. It is not sufficiently necessary to invest the amount that would be required to buy the property. I don't think it was necessary to locate a blacksmith's shop where it was located. I should think there is a necessity of having a blacksmith's shop. They might locate it anywhere where they had a vacant lot. I think it should not have been located where it was, because it is too valuable a lot. It could have been located almost anywhere. It could have been located right between the two tracks at the end of the freight house, and it would have been a more appropriate place than where they did locate it. It is not a fact that I do not know and cannot tell anything about where it is necessary to put a blacksmith's shop. I ought to know. I say it should not have been located where it was.

Thereupon said counsel for the said defendant propounded the following question to the said witness: Do you know that that property was all purchased by the La Crosse Company over twenty years ago,
352 and dedicated exclusively to the uses and purposes of the road?

To which said question said plaintiff, by his said counsel, did then and there object, as calling for testimony which was irrelevant, incompetent and immaterial; which objection was overruled, and said question allowed; and to which ruling and decision said plaintiff, by his said counsel, did then and there except.

And the witness answered: "I don't know that. I presume it was bought at that time. I have no recollection of looking over the record, but it was bought at the time that they were buying every place where they would take stock for pay; and was scattered all over the city; bought property all over the city where they could get land for stock. I am stating what I know. They purchased property on the canal line, from North Humbolt bridge to a street at the end. They did purchase property aside from that, and except what they contemplated for depot grounds, purchased it across the canal. I think I can almost say that I know they did not buy it for depot grounds, because they bought their lots wherever they could get a lot. I have had a good deal of talk with the president of the road; I know what Byron Kilbourn's policy was. In the first place I have bought thirty-four lots, scattered for nearly a mile; that is on the record for this county, in the name of
353 the La Crosse & Milwaukee Company. This deed was taken, and the property included in that deed was taken, from the records in this city. I have had a great deal of talk with Kilbourn. I am telling you what I know. I have Kilbourn's policy by intercourse with him. He tried very hard to have us go on; told us how he could buy lands with his stock, &c. That is the only source I think of now; that is my knowledge. I have had a passing acquaintance with the property since

1856. I think it was owned by the La Crosse Company from the time I first knew it up to 1859, and until it was sold on my judgment in 1859. I know that teams came across the vacant lots. I know that property was not used by the railroad company in any way except by that shanty. Other persons than those connected with the railroad company would cross over the vacant lots. It was quite a thoroughfare for teams to run across, like any vacant lot contingent to a railroad. I think at the point beyond the lots on which the blacksmith's shop stands that all that is necessary is to have the necessary slope. That land is below the railroad, so the slope don't wash on to the railroad; you don't need anything like the width between the borrowing pit and the bank.

354 I suppose the railroad does wash on to other people's land. There might be a small place for the water to run on the land of the railroad company.

I estimate a good, long, wide burrow there; there is no real necessity where the bank goes up to fifteen feet that there would be if it were in a cut. I do say that there is no necessity for that land at that point for the company. There might have been at one time gravel of the poorest kind in that burrowing pit. It is not necessary in a city to have a burrowing pit or gravel bed for the railroad; I am positive about that. When land costs so much you can't afford it. Of course gravel is valuable in some places more than others. In some places gravel is a drug, but here it would be valuable. That is not gravel. A little of the soil might be taken for ballasting, but generally it is clay and hard pan. I say it was not necessary to have that piece of land. It is necessary to have side tracks connected with the railroad; here you have ample room for four times the side track; you can have all the side track you ever need. There are three side tracks. The track runs up, I should think, a quarter of a mile, double track. The other runs down here to the tool shops. I don't know the amount of side tracks of this road in the city of Milwaukee in 1867. I don't know whether their side

355 tracks were sufficient for their business or not. My experience in operating a road has been that we most always had a train of cars and locomotive, and built most of our railroads, and used the locomotive and train in the construction of railroads. I had the lease of the depot grounds in Detroit; our warehouses were arranged by me. I had the lease of the property at the eastern terminus of the Pontiac, and subsequently the Detroit and Milwaukee road for three years—the lease of the depot grounds at the terminus of the road. I had nothing to do with the operating of the road more than take care of the cars, and put in a side track. That was all personally that I had to do. I was there myself. I have never operated a railroad for general traffic, never have been superintendent. I remember two or three roads where we had the right to operate the road until the track was fully completed. That is, to operate our construction trains in building it.

I presume you mean me to understand that you ask me whether I have had the management of the running of the railroad; general management. I have not, and have never been personally engaged in any capacity on the roads in operating such a road, and nothing more in the way of general freight, than that we carried freight over our

356 lines while we were constructing the roads, until they were completed.

Thereupon said defendant's counsel propounded to said witness the following question: I want to ask you if that strip of land there, that depot ground, thirty feet wide at the south end from the main track (being the strip which is marked, "This tract has always been vacant.

This tract is sixty feet long, by from thirty to thirty-six feet wide.") and sixty feet wide at the north end, is not a good and suitable place for a side track?

To which said question said counsel for said plaintiff did then and there object, as calling for testimony that was irrelevant, incompetent, and immaterial. Objection overruled. To which ruling said plaintiff, by his said counsel, did then and there except.

And the witness answered: It would be a good place; nothing could be better; because it is all level, the whole tract, clear down to the fence. I was pretty well acquainted with the financial condition of the La Crosse Railroad Company. I can't say when it commenced building. I have not traveled out of the city over that line of road, or beyond the line of the city. I cannot tell at what time they commenced building, but it was in 1854 or '55, and they commenced business soon after. I cannot tell when the road got into financial embarrass-
357 ment so it was unable to prosecute the work. I cashed a note in 1857; it was the first note ($25,000). I know of it having been protested. They failed, and went to protest in 1857. I don't think they afterwards revived. I know its financial condition from that time to 1867. I never knew of the Minnesota Railroad Company having any means to prosecute the road. I think the road was in the hands of a receiver from 1860 to 1866. I say they could not use the grounds for cattle yards east of this track, because it is too steep. They might turn the cattle onto the side hill; it was fenced in (the spot marked as owned by the Quentin's estate) is a cattle yard, and some of the fence and a good many posts remain there to-day. They had no cattle yard on the spot that is marked red. I never saw any signs of any there. I say I do not know they had any there. I don't think they could have used that part of it for a cattle yard just as well as the Quentin tract, for the reason that that is a very steep bank, and that is much more level. It is a great deal steeper; all the way it grows steeper. The southwest end is steeper than the other end. There is no room for cattle yards except on the side hill. The lots themselves show it is not used for cattle yards, because it has grown up with shrubbery. I
358 say it could be used, and that there were cattle yards on the Quentin estate.

I am the plaintiff in this suit. I consider this particular tract of land a very small portion of the ground in suit. I claim the whole property in the deed in this suit. I do consider it to be an important issue in this suit, whether the property described on the maps is material or needed, or is necessary for the use of this road. I do consider it important, to the extent of the value of this property, if we do not obtain the whole of the property. I think it belongs to me, at any rate I think we shall get a judgment for the whole of it; that is my opinion. I think if I can satisfy the jury that it is not necessary for the road, it will belong to us. I don't understand that if I do not satisfy the jury that it is not necessary for the road, that I will not get it. I expect to get the whole of it under our deed. If we don't get the whole of it, we may get some other parts of it. I don't expect to get a part of it if I don't get the whole of it, unless I can satisfy the jury that it is not necessary for the uses of the road.

I am swearing in this case for myself. I do say, that if my own testimony and that of the other witnesses shows that the land was not necessary, that it does give me this piece of land. I mean by the other witnesses your own witnesses; Mr. Sill was one. I don't re-
359 member the names of the others; they are your own witnesses.

Ques. You are then swearing here on a matter of opinion, giving your opinion for the express purpose of putting a large property into your own pocket?

Ans. You may construe it in that way if you please; the title of it is all in my own pocket.

Ques. If you succeed in taking it out of our pocket?

Ans. That is my object, or out of your possession.

Ques. You are swearing as an expert here, and giving your opinion on a question, the simple effect of which is to put the property in dispute in your pocket, or give it to you instead of the defendant?

Ans. As far as my testimony goes, it is for that purpose.

Redirect examination:

The $25,000 note I spoke of was the note upon which the judgment was obtained in the circuit court of Milwaukee County. I do expect, if I do not succeed in recovering all the lands mentioned in the deed, to recover in this case all the lands which I am able to satisfy the jury were not necessary for the operation of the road. The note was given to C. & S. Howard; S. Howard was my brother. It was not given to us by the company. We cashed the note; we got it from the Madison & Watertown Railroad Company.

360 R. D. JENNINGS, called as a witness for the plaintiff, being sworn, testified:

Am secretary and treasurer of the Chicago, Milwaukee & St. Paul Railroad Co. That is the company formerly known as the Milwaukee & St. Paul R. R. Co., and is the successor of that company. I have been the treasurer of the company since the 12th of July, 1869. I have in court here the journal, ledger and cash book of the Milwaukee & St. Paul Railroad Company, or of the Milwaukee & La Crosse, which contains entries in and during the year 1867. There are no books, so far as I know, of the La Crosse and Milwaukee Railroad Co. The Milwaukee and St. Paul Company's we have in court, but I don't know whether they come down to 1867 or not. I have here the ledger, journal, cash book, index and record book. The record book is the record of the proceedings of the board of directors of the St. Paul Company after its organization. There is no name in the index book of Fred P. James. These books are not in my custody as secretary and treasurer of the Chicago, Mil. & St. Paul Railroad Company. There are no entries so far as I have examined, showing that Fred P. James ever paid to the railroad any money on the assignment to him of the judgment of Cleveland against the La Crosse Railroad Company.

361 These books came from the auditor of the company, James P. Whaling. I understand these to be the books called for by the subpœna. The books now produced here are the journal, ledger and cash book. The book now shown me is the record book of the board of directors of the St. Paul Company. The first entry in this book appears to be under date of May 1st, 1863. There is no entry on that book, or I have not seen any of the proceedings of the board of directors, in relation to a settlement with Selah Chamberlain.

Ques. Do I understand you to say from an examination of that book at my request, that there is no record in the record book of the board of directors of the Milwaukee & St. Paul Railroad, showing a settlement with Chamberlain?

Ans. My answer to that is, I have never seen any such record. I do not say there is no such record, but I have not seen it.

DWIGHT W. KEYES sworn in behalf of the plaintiff:

I am now in the freight department of the Milwaukee & St. Paul Railroad Company. I know Selah Chamberlain, was in his employ. While in his employ, he had possession of what is known as the La Crosse and Milwaukee Railroad, under a certain lease. I remained in his employ after the organization of the Milwaukee & St. Paul
362 Railroad. I kept his accounts a little time after that. I know the judgment of Chamberlain was satisfied with him in some shape; I don't know who settled it. I mean to say he got his pay. I don't mean to say it was satisfied. I think the judgment was paid, so far as Selah Chamberlain was concerned, some time in 1862. He received preferred stock, I think, of the Milwaukee and St. Paul Railroad, and income bonds.

I think the settlement was made in 1863 instead of 1862. I think the receiver was in possession of the railroad; I don't exactly remember when the road was turned over by the receiver Crocker. I know that Chamberlain became at one time the owner of the judgment of Cleveland against the La Crosse Railroad. It was assigned to James B. Cross, then president of the Juneau Bank. He had advanced some money to Chamberlain, and the judgment was given to him as security. I don't know personally anything about the amount which was paid by Cross, or that anything was paid by him. I know nothing about the transfer of that judgment by Cross to the Milwaukee & St. Paul Railroad Company. I had no personal knowledge of the transaction between Cleveland and Cross. I do not know, as a matter of fact, whether any money was passed. I do not know whether that assignment was in fact
363 ever delivered to James B. Cross; I was not present when the assignment from Cross to Chamberlain was drawn; I don't know, of my own knowledge, whether Chamberlain paid in fact anything for the assignment of that judgment.

Plaintiff's counsel, in this connection, offered in evidence the paper which Mr. Cary produced, purporting to be the assignment of Selah Chamberlain, dated on the 27th day of June, 1863, and reads the assignment in connection with the record.

The district court of the United States for the district of Wisconsin.

SELAH CHAMBERLAIN
vs.
THE LA CROSSE & MILWAUKEE RAILROAD COMPANY.

Judgment entered upon warrant of attorney and docketed October 2nd, 1857, for $629,089.72 damages, besides costs of suit.

In consideration of one hundred thousand dollars of the first-mortgage bonds of the Milwaukee & St. Paul Railway Company, two hundred thousand dollars of the full-paid preferred stock of said company,
364 and two hundred thousand dollars of the income bonds of said corporation to me paid, I do hereby sell, assign, and transfer to the Milwaukee & St. Paul Railway Company all my right, title, and interest in and to the above-mentioned judgment, hereby authorizing the said corporation to collect and enforce payment thereof in my name or otherwise, but at its own cost and charges.

And I do hereby, for the considerations aforesaid, also sell, transfer, and assign to said company all my claims and demands against the La Crosse & Milwaukee Railroad Company, excepting such second-mort-

gage eastern division bonds, so called, as I may have or be interested in; and excepting also a certain judgment recovered in the name of Newcomb Cleveland, plaintiff, against the La Crosse & Milwaukee Railway Company, on or about the seventh day of October, A. D. 1857, in the said district court, of which claims and demands hereby sold and assigned, or intended so to be, a portion thereof constituting the consideration of said judgment hereby assigned, and other portions thereof was for work, labor, and materials, done for and furnished to the La Crosse & Milwaukee Railroad Company.

The judgment hereby assigned, I claim became, at the date of its entry, a lien upon the eastern division of the La Crosse and Mil-
365 waukee Railroad; and also claim that it is a lien upon that part of the Milwaukee & Western Railroad from the junction to Columbus. This assignment of the judgment aforesaid, however, is made and accepted upon the express understanding and agreement that the Cleveland judgment aforesaid, excepted from sale and transfer, shall have the priority of lien upon and payment from any property, fund, or means from which the said judgments are or may be entitled to be paid; and that all moneys or means realized by virtue of the lien of said judgments, or either of them, so far as may be necessary for that purpose, shall be first applied to the satisfaction of the unpaid balance of the said Cleveland judgment.

In witness whereof I have hereto set my hand and seal this 27th day of June, 1863.

SELAH CHAMBERLAIN. [SEAL.]

Said assignment was duly and legally stamped with internal revenue stamps.

Whereas the La Crosse & Milwaukee Railroad Company were, on the twenty-sixth day of September, A. D. 1857, indebted to Selah Chamberlain in the sum of over five hundred thousand dollars, to secure the payment of which said company on that day, by an instrument in writing executed by said company and said Chamberlain, sold and con-
366 veyed to said Chamberlain all the personal property of every name, kind, and description in the State of Wisconsin, except such as was used in and was appurtenant to the Watertown Division of the La Crosse and Milwaukee Railroad; and by said instrument in writing did also lease and let to the said Chamberlain, from and after the thirtieth day of September, in the year 1857, for an indefinite term of time, to be determined in the manner hereinafter specified, its entire railroad and railroad route from the city of Milwaukee, by the way of Horicon and Portage City to La Cross, together with its right of way, depot grounds, and all buildings, tenements, and fixtures of whatsoever kind or description, and all the rights, franchises, and privileges of said railroad company, to receive the tolls and income therefrom; and after paying interest on prior liens on said property to apply all the rest and residue of said net receipts in payment of the said indebtedness of said company to said Chamberlain, and that when said indebtedness was fully paid said lease shall cease and determine.

And whereas a large proportion of said indebtedness of said Chamberlain, amounting to about the sum of five hundred thousand dollars, still remains due and unpaid to said Chamberlain, which said indebtedness said Chamberlain has sold and conveyed to the Milwaukee
367 & St. Paul Railway Company, by an assignment bearing even date herewith; and whereas it was understood and agreed that said Milwaukee and St. Paul Railway Company should have all the benefit

and advantage of said lease for the purpose of securing the said indebtedness so remaining due;

Now, therefore, be it known that I, the said Selah Chamberlain, in case the possession of said road, or any part or portion thereof, shall at any time be decided or adjudged to belong to me, the said Chamberlain, under and by virtue of said lease, am held and bound unto the Milwaukee & St. Paul Railway Company to accept said portion of lessee, take possession of said road, or such portion thereof as I may of right take possession as such lessee under said lease, and hold and operate the same as in said lease provided, and after paying and discharging the trusts therein named, to pay over to the said Milwaukee & St. Paul Railway Company all the rest and residue of the net receipts arising from the operation of said road; it being understood that said Milwaukee & St. Paul Railway Company are to hold and save me harmless from all loss, cost or damage in executing said trust, and that I am to have a reasonable compensation therefor.

In witness whereof I have hereto set my hand this 27th day of June, A. D. 1863.

S. CHAMBERLAIN.

[Two 50-cent stamps.]

368 I know the books which are here in court, and which are called the journal, ledger, cash and index books. They are the general books of what is now the Chicago, Milwaukee & St. Paul Railroad. I kept those books, and the entries are in my handwriting. There is no account on those books with Fred. P. James. I don't remember of any entries on these books, or either of them, showing any moneys paid by James for the Clevel nd judgment. I don't remember ever having made an entry of a payment by Fred. P. James to the railroad company for the so-called Cleveland judgment. I don't remember any entries in these books showing that the Milwaukee and St. Paul Railroad Company ever paid to James on the sale at the suit of James against the Milwaukee & Minnesota Railroad Company any money for the title they acquired under the decree in that suit. These books I kept from 1863 to 1865. There were books kept in New York. Reports were made from this office to the home office, and carried into these books. If Fred. P. James had paid for this judgment, these books would show it in the usual course of business. I don't remember that the cash book shows any receipt of money from James during the time it was kept. I mean from my own knowledge of the books, that they do not show any receipt of
369 money from James during the time they were kept. I can't recollect whether the cash book shows that the Milwaukee & St. Paul Railroad Company paid any money to James. I don't remember anything of it now.

Cross-examination:

Paper shown witness, who says that it is in the handwriting of Selah Chamberlain.

Counsel for the defendant offers in evidence the said paper.

Objected to by the counsel for the plaintiff, as not being any evidence of the payment to Chamberlain as between the St. Paul Railroad Co., the defendant in this suit, and Charles Howard, the plaintiff in this suit; that the payment cannot be proven by the mere production of a receipt as between these parties. Objection overruled. Paper admitted in evidence. To which said ruling and decision said plaintiff by his said counsel did then and there except.

Paper is a receipt signed by Selah Chamberlain, acknowledging payment for the assignment of the Cleveland judgment.

WITNESS. I do find an entry on the books for that amount.

Redirect examination:

The entry is under the head of the account of income bonds.
370 There is an entry on the journal, I suppose page 258, headed "Income bonds." On the credit side of that entry is the following: "Income bonds credited by purchase of road $289,137.75." That is the entry which is made showing that the St. Paul Railroad Company paid to Chamberlain for the Cleveland judgment. That is the way I understand it.

Ques. (By Mr. CARY.) How do you mean; the whole entry?

A. Not the whole entry. You have to refer to both books to show the whole of the entry.

On the 92nd page of journal A, the entry on the book is as follows: "Income bonds, $289,136.75, the amount payable from earnings of the road, due 1866." That sentence is on the credit side of page 258 on the ledger, as follows: "1863, January 31st, by purchase of the road, $289,137.75," and is in my handwriting, and I made it at the time of the transaction.

Recross examination:

The full amount, as testified, was paid to Chamberlain. That, with the $89,000 paid for the Cleveland judgment, makes in all $589,000 paid to Chamberlain for the two judgments.

Redirect examination:

I don't know whether these transactions of these two assign-
371 ments took place after the date that the circuit court of the United States had decided that the Chamberlain lease was void as against the Cleveland judgment.

Recross-examination:

I was with Chamberlain at the time the judgment and lease were taken; before and after.

Ques. State whether the judgment was taken for just the amount that was then due Chamberlain from the La Crosse Company.

Objected to by the counsel for the plaintiff, for the reason that the United States court, at the suit of Cleveland against Chamberlain, on this identical judgment which the defendant now claims to own, decided that said judgment and lease of said Chamberlain, as against said Cleveland, was utterly void, and that the defendants, standing as the assignees of Cleveland, are in no position to now assert a claim that said judgment and lease were valid as against the Cleveland judgment. Objection overruled; question allowed. To which ruling and decision said plaintiff by his said counsel did then and there except.

The witness answered: There was due to him from the La Crosse Company, $629,072.89; that is my recollection of the amount for which judgment was entered. That amount was due him for construction of
372 the road between New Lisbon and Beaver Dam. I made up the amount at the time, what was due him; made it up correctly from the books to the best of my ability; made it from Mr. Chamberlain's account of the amount due him, not from the company's books; made it up from the account of Chamberlain, the estimate of the amount due him.

Redirect examination:

I took Chamberlain's accounts just as they appeared on his books and made it up entirely from my knowledge of Chamberlain's books.

W. N. D. WINNIE, called by the plaintiff, being sworn, testified:

Am general book-keeper of the company. Am familiar with the accounts of the Milwaukee & St. Paul Railroad Company and have been since I have had charge of them. Been book-keeper for the company since 1871. From my knowledge of the books and as book-keeper, I do not know of any entries in the books showing a payment by James to the St. Paul Railroad Company of any moneys for the purchase of the so-called Cleveland judgment. Never have seen any entries of that kind in any of the books of the company. I have no knowledge of any moneys having been paid by the railroad company to James for the lands which were sold under the so-called Cleveland judgment at the suit of James against the Milwaukee & St. Paul Railroad
373 Company. I don't know of any record of the board of directors of the Milwaukee & St. Paul Railroad Company which shows any payment by that company to James for the lands which were sold under the Cleveland judgment.

JOHN W. CARY, being sworn as a witness for the plaintiff, testified:

I was the general attorney of the Milwaukee & St. Paul Railroad at the time that the suit of James vs. The Milwaukee & Minnesota Railroad Company, on the Newcomb-Cleveland judgment, was commenced. I handed to you during the examination of Mr. Keyes what I claimed was an assignment of the Cleveland judgment to James. I have that paper now in my hand and it is the assignment. I don't think I was in New York at the time that paper was executed. I don't know of my own knowledge that that paper ever was delivered at that time, July 8th, 1864, in the city of New York, by anybody connected with the railroad company to James. I have no knowledge on the subject.

Ques. As a matter of fact, did you not prosecute that suit of James against the Milwaukee and Minnesota Company, for and on behalf of the Milwaukee & St. Paul Railroad Company?

374 Ans. I can tell you just what the circumstances were; I can only answer by stating the facts; which I will do if permitted. I never received any pay from James for any services in that case as attorney or otherwise. In 1864—I should think it was in June when the board of directors were here, I cannot name them—the question was brought up about prosecuting these judgments, as against the Milwaukee & Minnesota Railroad Company, for the purpose of acquiring the title to the property. They were owned by the St. Paul Company. For some reason or other, that is not very clear to me now, nor do I remember who suggested it, there were some objections to prosecuting the suit in the name of the St. Paul Company on these judgments, and it was proposed that they should be assigned to some one in the interests of the company, to prosecute the suits in their own name. An understanding was then had that they should be assigned to James, and, for them, that he would give his note of $50,000, with a proviso in it that he might pay that note at any time by a retransfer of these judgments with their proceeds to the company. In pursuance of that arrangement, as I understand, this assignment was made, and the papers shortly afterwards came into my hands. Suits were commenced
375 in the State courts, which resulted in the courts deciding they

had no jurisdiction. The matter remained in that state until April, 1866. At that time this court, Judge Miller and Justice Miller, made a decision in the cases of the Milwaukee & Minnesota Railroad Company vs. Chamberlain & the Milwaukee & St. Paul Co., The La Crosse & Milwaukee and St. Paul Co. vs. The Milwaukee & Minnesota Co.

Mr. Howard was no party to that suit. That decision was made in the case of Chamberlain. It was determined it was advisable to prosecute the Cleveland judgment to a decree and sale, for the purpose of perfecting title to the road; and as this assignment had been made at this previous time, it still stood in the name of James; and, although I did not believe the law of this case as decided by this honorable court, it was deemed best to prosecute in the name of James, and two days afterwards the bill was filed in the James case on the Cleveland judgment in the name of James. In due time I took an appeal from this decision and reversed it. On the sale in that matter, the James suit, I bid off the property in the name of the Milwaukee and St. Paul Co. I subsequently told Mr. Mitchell that all that was necessary was to surrender James' note and for him to surrender his note; that if they chose to take anything to show that the company did not
376 owe him anything, that they could do so; and he concluded to do so. I suppose that was done, but I never made an inquiry whether it had been or not. That was the reason of the assignment to James, the object and the purpose, and the only object I ever knew of making the assignment to him.

I cannot answer from any absolute recollection whether I received that assignment from Sage, but presume I did. I think Sage was the president of the company at that time. James was also a director in the company at that time. The bill of James against the Milwaukee and Minnesota Railroad Company was not submitted, by an arrangement between myself and Matt. H. Carpenter, representing the Milwaukee & Minnesota Railroad Company, without argument. It was submitted by myself without any great deal of argument, and by Asahel Finch, of your firm, on the part of the Minnesota Company. It was not submitted without argument by an arrangement between myself and Carpenter that it should be submitted, as I recollect the transaction, at all. I can only state my recollection in regard to the matter. There was a petition filed by Mr. Finch after the case had been submitted and adjudicated on behalf of the Minnesota Railroad Company, asking to be heard in the case, and the application was denied.
377 That was after the decree had been entered. I can only answer as to my best recollection whether or not that was the first time that Mr. Finch appeared in the case for the Milwaukee and Minnesota Railroad Company. My recollection is it was not; I may be mistaken. I would state more fully in regard to that. That case was set down for argument at the January term at Madison. Mr. Carpenter was then acting for defendant in the case, and I urged the hearing at that time. He asked a continuance; it was resisted; and it was finally stipulated, for his convenience entirely, that the case should be heard by the judge at chambers here, and decided as of that term. The case had all been prepared, testimony all taken, but before the trial of it Mr. Carpenter declined further to test the case, went out of it, and my recollection of it was, substituted Mr. Finch in his place; that I may be mistaken about. Mr. Carpenter appeared before Judge Miller and stated, I think, that some one else was to appear; at any rate, that he was not any longer going to defend the case. And then there was no argument, be-

yond some explanation of the matter to Judge Miller. I will state I cannot positively recollect whether Mr. Finch appeared in it or not.

Witness is here shown a letter, which letter is as follows:

378 [Office of Randolph, Alexander & Green, counsellors at law, No. 20 Exchange Place, in rear of custom-house.]

NEW YORK, *Sept. 13th*, 1866.

Mess. FINCHES, LYNDE & MILLER:

GENTLEMEN: On the 7th instant I wrote M. H. Carpenter, esq., to transfer to you the legal business of the Milwaukee and Minnesota Railroad Company. I now send you this by Mr. A. P. Green, treasurer of the company, with whom you will please confer.

I will thank you to keep me advised as to the position of legal matters in regard to the company.

Respectfully,

ASHBEL GREEN,
Ch. Ex. Com'tee.

The witness says it is a letter dismissing Mr. Carpenter and appointing Mr. Finch as attorney.

Ques. Why did you not make Charles Howard party defendant in the case of James vs. The Milwaukee & Minnesota Company?

Ans. In the first place I did not know that Howard had any—at least it did not occur to me that there was any claim of his. The controlling idea, however, in commencing the suit was simply this, that the Minnesota Company was the only thing we had to fight; the only
379 party that had been fighting us. We had acquired all the claims that had appeared to contest the matter, I think, prior to the claim of the Minnesota mortgage, except this sale of Howard's. This did not occur to me, but the prevailing thing they wanted was to commence a suit, and drive it to a decree in the quickest time possible. I do not recollect that the subject of Howard was mentioned. The matter of the judgment of Howard had been in litigation to collect the balance of that judgment, and we had purchased it and owned it; but to my recollection this claim of Howard's now set up has never been brought to my attention. I do not know as there was anything stated on the subject. Emmons & Cowdray—Emmons was then employed by the company—prepared this bill. Cowdray was one of the directors of the St. Paul Railroad at that time. I was in the general consultation of what should be done, but do not recollect the subject of this claim of Howard's being brought up, or spoken of by any one. It did not occur to me, that I recollect, and the only thing I know they were anxious about, the principal thing at any rate, was to get a decision as between them and the Minnesota Company in the quickest time possible.

Ques. Was not that bill brought in the United States court in the name of James because you could not get jurisdiction in the State
380 court if you brought the suit in the name of the real owner of the judgment, the Milwaukee and St. Paul Railroad Co.?

Ans. I have stated the manner in which the judgment was assigned to James. I have stated that only two days before the commencement of that suit this court did decide in just such a case, a case precisely similar, they had not jurisdiction. I presume that decision had influence with us in continuing to prosecute that thing in the name of James, although the transfer had been made to him nearly two years previous, on a different consideration. We did not want to run against the de-

cision of this court, and have to wait until we could go to Washington and get it reversed. I have no doubt that was an important matter why we did continue to keep the thing in the name of James. I have not the assignment of a judgment to Howard for a deficiency executed to the Milwaukee & St. Paul Railroad Company. I do not know where it is. I have searched my papers for it, and cannot find it.

CHARLES HOWARD recalled.

The assignment of the balance of the judgment against the La Crosse Railroad was made on the 18th of November, 1863. I find that
381 entry in my petty ledger, two days before I had the deeds recorded. The deeds were recorded on the 20th of the same month. The assignment reserved to me all my rights under the proceeding in the State court. I delivered the assignment to one of the attorneys that drew the papers. I think to Judge Hubbell. Emmons or Hubbell attended to the business. I sold the company the balance of the judgment for $10,000. They brought me Mitchell's check for the amount. The assignment was of the judgment in the United States court. I never heard of the payment of the $1,000 until here in court last year, on the trial of the other suit of myself against the railroad company. I never received any portion of that $1,000. I never heard of it before, until in court last year. I never supposed there was a cent received until I heard of it in this court.

Cross examination:

Judge Hubbell was my attorney up to the time of the assignment. I can tell how much I paid him. We settled the day of that assignment. I paid him in all some $2,000. It was only a small balance due him at the time of the settlement.

Redirect examination:

After the assignment I did not have anything to do with the suit
382 in the United States court in relation to the La Crosse Railroad Company.

Defendant's counsel here offered in evidence the map produced by them and exhibited to the witnesses, and the said plaintiff's counsel also offered in evidence the maps produced by them and exhibited to the witnesses.

Maps are hereto annexed and made part of this bill of exceptions.

E. H. GOODRICH, called by the defendant, being sworn, testified:

Was connected with the La Crosse Company from the time of its organization up to 1865; was superintendent and manager from 1859 up to 1865; the railroad company was deficient in side-tracks; we had not ground sufficient to make the necessary side-tracks for the successful operation of the company; not as other roads were provided with ground, or as compared with other roads doing the same amount of business; we had not side tracks enough to accommodate actual business of the road; the old La Crosse Company has had no office, place of business, officers, or any known organization since 1860; I cannot state the exact date; about that time; so far as I had any knowledge, it had ceased
383 entirely to exist as a corporation; I know of no existing organization, and it had no existence since that time; no officers, agents, or anything of that kind that I know of; I was connected with the defendant from the time of its commencement until 1865, and after

the La Crossé & Milwaukee organization was succeeded by the Milwaukee & St. Paul.

Cross-examination:

I cannot recollect who was the last president of the La Crosse Railroad Company; I don't know how many there were; I have no recollection about it; I have no recollection that Daniel Wells was ever president, or Cleveland, since 1860; I want to say in explanation that the La Crosse Road, after it passed into the hands of Chamberlain, lessee, that I had no intercourse with them; I got my orders directly from Mr. Chamberlain; all I mean to say is, I have now no present recollection of anybody that was president after Byron Kilbourn.

(Map used by the plaintiff shown to the witness, who examines the plat where the wood-sheds are located.)

Our side tracks are all east of what is the main line on this map. I have no recollection of ever using any of the property west of the main line for side-tracks. I think my appointment as superintendent was made in 1856, and I worked from that date until 1865; the road
384 at that time was built to La Crosse, and what was known as the Horicon Branch, built to Berlin, was built at that time. During some portion of the time all of those lines of road were being operated, and came in on that main track; they changed the course of business and swung around the city after I left; the usual width of a side-track is four feet 8½ inches, and then you must have space beyond that to allow for the passenger cars.

Redirect examination:

At the time this business was carried on, we were actually deficient in side-tracks when we were operating the road; the ground on the west side of the main track would have been suitable for side tracks if we had had the means to put them in, but we were too poor, and had to get side-tracks elsewhere.

Thereupon said defendant, by his said counsel, propounded to said witness the following question: Was the trouble why there were no more side-tracks on the land because you had not means to do it with?

(Question objected to by the counsel for the plaintiff as irrelevant, incompetent, and immaterial. Objection overruled, question allowed, and to which ruling said plaintiff by said counsel did then and there except.)

385 And the witness answered: We were all the time in want of side tracks; as fast as we had opportunities to increase our side-tracks we did so—opportunities and means. My impression is, that we had cattle-yards from Humbolt avenue; I cannot tell the distance that they extended from the avenue; my impression is it was within 150 or 100 feet south of the avenue; it was not a proper place at all for that kind of thing; the bank falls off there very steep; that was not a convenient place for side-tracks; no portion of that property east of that track would have been suitable for side-tracks without great expense; the bank falls off to the river very abruptly; that was not the place where we wanted to do the general business; these were tracks that were really for the accommodation of the shops and round house and the operating of the engines; the place where we would construct the side-tracks necessary for doing business was below. The distance from Humbolt avenue to the round house, I should guess, is 800 or 1,000 feet, perhaps 1,800 feet, from the switch; the side-tracks represented on this map were the side-tracks that ran to the

round-house and the shops and buildings there. There were sufficient side-tracks in the yards for the accommodation of the company.

386 Redirect examination:

We thought all the grounds were then necessary. We expected, like every other corporation, to grow into a large corporation and want more room. We did not use it at that time, and got along without it. We never used it, because we became embarrassed, and did not make what we expected to. We considered it all necessary. I should consider it necessary to-day to have that much room.

Recross-examination:

I do not base that entirely upon my theory of the immense amount of business we would do if we had money. That would not be considered anywhere an unusual amount of room; thirty feet from the center of the track is less than the usual quantity anywhere. We want it.

G. E. WEISS, called by the plaintiff, being sworn, testified:

I have made up a statement at the request of Mr. Cary of the amount received by the Milwaukee & St. Paul Company for the property not actually occupied by the company. Have made it up from 1867 to to-day. I have included in that statement merely the leases of
387 the buildings that are occupied by tenants, and nothing else. That that is written in ink was written in the office of Superintendent Rock. It does not give the lots and blocks. The statement includes the entire rents which the railroad company have ever received for all of the property which has been rented. The amount of rents is $11,992.85. That is from 1867 to 1876. There is $750 to be added, which makes the total $12,742.85. I don't know whether the line has been rented to other railroads during this period. I have nothing to do with it. I made up no estimate as to the value of the use of the railroad line or the warehouses, or the elevator, simply the houses and lots on blocks 40 & 41, and one or two others. As to the figures, they were made up in the superintendent's office. I don't know what they include, but my figures include the building called the brick drug store, merely.

Cross-examination:

The company have paid taxes on that over and above what was paid to the State for the railroad. We have paid taxes, aside from what was paid to the treasurer, for property lying in the second and first wards, to the amount of $13,104.70. That amount has been paid by the company. I have had the superintendence of paying the whole of that amount, and in addition we have paid the regular three or four per cent. into the State treasury.

388 JOHN W. CARY recalled:

After the Northern Railroad was built it connected with our road at Schwartzburg, and it has run into that depot ever since that time. That road afterwards became the Central Railroad, and afterwards bought the Northern road and has continued to run there. At least they leased the Northern road. As I understand it, they never received anything in the way of rent; but I am not fully posted as to the Northern road. I know more about the matter of the Central Railroad. The St. Paul company has never received anything as rent from either of those companies. Those companies have used a certain portion of our track for their business that comes in there at North Milwaukee, and they use a certain other portion for that that comes in at

South Milwaukee, around the city, but they receive a portion of that. That is, there is a division, and a certain amount goes to the St. Paul Co. and a certain amount to the other company—a certain amount to our company, and the balance to them, or what goes over. The exact division I do not recollect. My impression is it is only a pro rata amount of it for the distance it passes over our road. I drew the contract, but I cannot recollect.

389 W. N. D. WINNIE recalled:

The business is divided on a pro rata basis on all that six miles between North Milwaukee and Schwartzburg, and the nine miles between South Milwaukee and Schwartzburg, 75 per cent. It would be hard to state from my knowledge what would be the amount of the earnings of the road. Of course it varies greatly; perhaps an average of $1,500 a month for freight and passenger from the point where the Northern road crosses the line of this road at Schwartzburg. That is the St. Paul company's proportion of the business on that track used by the other company. Six miles and $\frac{17}{100}$, I think, is the distance from North Milwaukee to the junction point, and nine miles from South Milwaukee to Schwartzburg. The amount is divided on the milage basis of the whole distance it goes, and then they pay to the St. Paul company 75 per cent. of that amount which is earned on their part. That is, they get 75 per cent. of the pro rata of the business. I can't state what proportion of that amount would be received on the line from Chestnut street up to Humbolt avenue. The distance is something over a mile; it is $6\frac{17}{100}$ of the whole, and the other way—it is over nine miles of it goes the other
390 way. That which passes over the south branch has nothing whatever to do with this line. The whole that goes over that road is in the neighborhood of $1,500 a month. I should say a very large proportion of that is on the line which goes around the city. I should say $\frac{4}{5}$ at least would go to South Milwaukee; $\frac{4}{5}$ would have nothing to do with this line; then of the 1-5 that went up here, this property would not have more than $\frac{1}{6}$ of that $\frac{1}{5}$.

Cross-examination:

I mean to say that that is about the sole extent of the business that is done on the road, starting from Prairie street, going north, until it strikes the junction of the Northern road. That is just my judgment. It runs from $1,200 to $1,800 a month, sometimes a little over. I don't know what the so-called Higby elevator has rented for for the last year or two; I don't know that it has been rented at all for the past six years. I could not give any estimate of the amount per month which the line of road from Humbolt avenue south to Prairie street has earned per year during the past six years without looking the thing up. All I know is the statement of the rent derived from the two companies, as I have given it. I cannot give you any estimate, including the revenue from the elevator. It would be a great deal of work to give a statement of the amount which the line of the road from Prairie street up to
391 Humbolt avenue would be entitled to under the pro rata arrangement. My estimate is that it is $\frac{1}{5}$ of $\frac{1}{6}$ of all that would be earned, without going into the details.

Mr. CARY. I am of the opinion that my statement was correct, that Mr. Finch was the counsel for the Minnesota company. My recollection is very strong that Mr. Finch was there at the time. I don't know as it a matter of any consequence. I recollect that Mr. Carpenter came in, and made his statement to the effect he was not going to argue the

case, was going to retire after the time had been fixed for the hearing. As I recollect it, Mr. Finch and I were both there at the time the case was submitted.

Plaintiff's counsel offered in evidence the petition which was filed on the 23rd day of February and the letter dated New York, 13th, 1866, addressed to Finches, Lynde & Miller, requesting them to appear for the Minnesota company, which said petition and letter are hereinbefore set forth in this bill of exceptions.

Said papers are heretofore set forth in this bill of exceptions.

And the above and foregoing was all the testimony given on the trial of this cause.

392 And thereupon said plaintiff, by his said counsel, did ask said presiding judge to instruct the jury:

First. That the plaintiff, Howard, having recovered a judgment in the circuit court of Milwaukee County on the 1st day of May, 1858, for $25,586.78, and which judgment was docketed on that day, and having issued execution and sold the lands mentioned and described in the deed read in evidence, which was recorded November 20th, 1863, the plaintiff is entitled, under and by virtue of the laws of the State of Wisconsin, to recover all of the lands mentioned in that deed which were owned by the La Crosse & Milwaukee Railroad Company at the date of the rendition of said judgment in this present action.

Which said instruction said judge did then and there refuse to give to the jury, and to which refusal said plaintiff, by his said counsel, did then and there except.

Second. That the defendants, by the records which they have introduced in evidence, have failed to establish any legal title in or to any of the lands mentioned in the said deed of said Howard, as against the said Howard, except the tracts of land for which Mr. Cary offered deeds, and that portion of the premises in block 41 which, it is conceded, was occupied, and has been all of the time occupied, by Mariner or his tenants.

393 Which said instruction the said presiding judge did then and there refuse to give the jury; and to which refusal said plaintiff, by his said counsel, did then and there except.

Third. That under the decree in the suit of Frederick P. James vs. The Milwaukee & Minnesota Railroad the defendant is not entitled to recover any lands or real estate mentioned in the plaintiff's deed except such lands or real estate as was actually used and occupied at the date of said decree by the Milwaukee & Minnesota Railroad Company as railroad depots, station buildings, and appurtenances.

Which said instruction said presiding judge did then and there refuse to give, and to which refusal said plaintiff, by his said counsel, did then and there except.

Fourth. That land cannot be appurtenant to land, and therefore, under the grant or description of lands specified in the decree in the suit of James against The Milwaukee & Minnesota Railroad Company, the defendant is entitled to none of the property in question under that decree, except the main line of the railroad and the buildings actually occupied as depots and station buildings, except that portion of the premises for which Mr. Cary has offered deeds, and that portion of the premises in block 41 which, it is conceded, was occupied and has

394 been all the time occupied by Mr. Mariner or his tenants.

Which said instruction the said presiding judge did then and there refuse to give, and to which refusal said plaintiff, by his said counsel, did then and there except.

Fifth. That the burden of proof is upon the defendant to satisfy the jury from the evidence that any portion of the premises mentioned in the decree was actually used and occupied by the Milwaukee & Minnesota Railroad Company as railroad depot and station buildings.

Which said instruction said presiding judge did then and there refuse to give, and to which refusal said plaintiff, by his said counsel, did then and there except.

Sixth. That under the word "appurtenances" in said decree the defendant cannot take title to any lot or part of a lot adjacent to or connected with depot or station buildings, unless as an absolute necessity for ingress and egress into and from the buildings so occupied.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which refusal said plaintiff, by his said counsel, did then and there except.

Seventh. That in no event, and under no circumstances, can the defendant in this suit recover any portion of the property east of the
395 railroad track, as marked on the map, and noted as "Open dock yard," as and under the pretense that it is an "appurtenant" to the railroad. The same as to the west half of lots 8, 9, & 10, block 41, or at least so much of these lots as are west of the line marked in lead-pencil, under the pretense that they are appurtenant to the railroad or station buildings.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff, by his said counsel, did then and there except.

Eighth. That all of the property in block 41 east of the railroad track marked "Higby's elevator" is not conveyed by the terms of the decree, and will not be covered or be passed under the word "appurtenant" to the railroad.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which refusal said plaintiff, by his said counsel, did then and there except.

Ninth. That all of lots 1, 2, 3, 4, & 5, block , which were owned by the La Crosse Railroad Company at the date of the docketing of the judgment of Sebre Howard, will not pass under the decree, as they are not described as real estate, and they are only claimed as part and parcel of the railroad, and are not and cannot be legally "appurtenant" to the railroad.

396 Which said instruction the said presiding judge did then and there refuse to give to the jury, and to which refusal the said plaintiff, by his said counsel, did then and there except.

Tenth. That under the term "depot," as used in the decree, the defendant cannot recover the real estate upon which the depot building stands.

Which instruction the said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

Eleventh. That the jury are instructed upon the evidence that no portion of lot 10, in block 40, except twenty feet west of the iron rail, is included within the terms of the grant.

Which instruction the said presiding judge did then and there refuse to give to the jury; to which refusal said plaintiff, by his said counsel, did then and there except.

Twelfth. That all of lot 9 as marked on this map is not within the terms of the language of the decree.

Which said instruction said presiding judge did then and there refuse

to give to the jury, and to which refusal said plaintiff, by his said counsel, did then and there except.

Thirteenth. That the jury are instructed that all that appears on the map in block 40, east of the railroad track, marked "Tibbits &
397 Starkweather's salt warehouse," is not included in the terms of the decree, and is not an "appurtenant" to the railroad.

Which said instruction said presiding judge did then and there refuse to give to the jury,and to which said refusal said plaintiff, by his said counsel, did then and there except.

Same instruction as the last, as to block 33.

Same ruling, same exception.

Fourteenth. That in any event the defendant is not entitled to recover as to lot 10, under the description in his decree, anything more than that portion of the lot which has endorsed upon it, "Frame building, occupied by Thomas Cramer, &c."

Which said instruction the presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff, by his said counsel, did then and there except.

Fifteenth. That in no event, and under no circumstances, can the defendant recover in this cause any of the lands which are marked in red upon the maps offered in evidence, which were not actually used and occupied by the Milwaukee & Minnesota Railroad Company at the time of the decree in the James case.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff, by his said counsel, did then and there except.

398 Sixteenth. That a railroad company seeking to acquire the title to property for the purposes of its railway is confined simply and only to that which is actually necessary, and that it is not entitled to take property simply because it may be convenient for the uses and purposes of the railroad company.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

Seventeenth. That if there is any ambiguity or doubt in the construction of the language of the decree in the case of James against the Milwaukee and Minnesota Railroad Company as to what passed by the terms of that decree, as said decree was obtained by an ex parte proceeding, to which Howard was no party, and as the defendant has selected its own language to express its own grant, that under such circumstances the language must be construed strictly against the defendant; that in this instance the defendant can take the title to no real estate not mentioned in the grant merely by implication, and cannot claim under the language of the grant that they have any title in or to any of the property connected with the railroad line that is not strictly "appurtenant" to that line. And that to acquire it as an appurtenance to the line the jury must be satisfied from the evidence
399 that the property so claimed as appurtenant was indispensably necessary to the use of the road. .

Which said instruction the said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

The said plaintiff further requested the said judge to charge the jury as follows:

Eighteenth. If the jury find from the evidence that the Barnes mortgage (so called) was executed in fraud of the rights of the creditors of

the La Crosse Railroad Company, and that the proceedings of Barnes to foreclose the same were fraudulent, illegal, and void, and that the organization of the so-called Milwaukee and Minnesota Railroad Company was under the foreclosure of the Barnes mortgage, that then and under such circumstances the said defendant can acquire no valid title to the lands in suit as against the plaintiff under or by virtue of the suit of Frederick P. James against the Milwaukee & Minnesota Railroad Company.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

The said plaintiff further requested the said judge to charge the jury as follows:

400 Nineteenth. That after the recording of the sheriff's deed to Howard the possession of the so-called Milwaukee & Minnesota Railroad Company was, in law, the possession of Howard, and as against the title of Howard under said deed said possession by said Milwaukee & Minnesota Railroad Company was wrongful and tortious.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

The said plaintiff further requested the said judge to charge the jury as follows:

Twentieth. That before the defendant in this action can establish title to the lands in suit under and by virtue of the decree in the case of James against the Milwaukee & Minnesota Railway Company, and a sale under that decree, the jury must find from the evidence that James was the bona fide assignee of the Cleveland judgment, on which said bill was filed.

Which said instruction the said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

The said plaintiff further requested the said judge to charge the jury as follows:

Twenty-first. If the jury find from the evidence that the assignment of the Cleveland judgment by the Milwaukee & St. Paul Railway

401 Company to Frederick P. James was never delivered to said James, that then the said defendants can claim no title to the real estate in question under or by virtue of said decree in said suit of James against the Milwaukee & Minnesota Railroad Company, or the sale under the said decree.

Which said instruction said presiding judge did then and there refuse to give, and to which said refusal said plaintiff by his said counsel did then and there except.

The said plaintiff further requested the said judge to charge the jury as follows:

Twenty-second. If the jury find from the evidence that at the time of the commencement of the suit of Frederick P. James against the Milwaukee & St. Paul Railway Company the said railway company was in fact the owner of the said Newcomb Cleveland judgment, and that said suit was prosecuted by the general attorney of the said Milwaukee & St. Paul Railway Company, and for the benefit of said company, that then, and under such circumstances, the said suit was a fraud upon the jurisdiction of the United States court, and the proceedings in said suit in said court are illegal, null, and void.

Which said instruction said presiding judge did then and there refuse

to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

402 Said plaintiff further requested the said judge to charge the jury as follows:

Twenty-third. If the jury find from the evidence that the Milwaukee & St. Paul Railway Company purchased the Cleveland judgment, after its organization, on the sale of the so-called western division of the La Crosse & Milwaukee Railroad, and after it had become the owner of said division of said road, and paid for the same in part in income bonds (so called), that then, and under such circumstances, the said judgment was, in law, fully paid and extinguished, and said railroad company could not thereafter institute any suit upon said judgment, or assign said judgment to any party to bring suit thereon, in order to obtain a title under or by virtue of any decree or sale had on such judgment.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff, by his said counsel, did then and there except.

The said plaintiff further requested the said judge to charge the jury as follows:

Twenty-fourth. Upon the undisputed evidence given in this case as to the purchase of the said Cleveland judgment by the Milwaukee & St. Paul Railway Company, the said Cleveland judgment was paid and extinguished by said company, and, under the proofs in this

403 case, the said railway company could not use the said judgment to obtain a title to the lands, property, or franchises of the La Crosse and Milwaukee Railway Company.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which refusal said plaintiff, by his said counsel, did then and there except.

Said plaintiff further requested the said judge to charge the jury as follows:

The record of the complaint of the suit of the Milwaukee & St. Paul Railway Company against the La Crosse & Milwaukee Railroad Company, in the circuit court of Milwaukee County, is proper evidence to go to the jury in this cause of the facts stated in said complaint, and if the jury find from the evidence that the Barnes mortgage, so called, was issued at the time and in the manner alleged in said complaint, that the facts as to the attempted foreclosure of said mortgage are as stated in said complaint, and that the proceedings to organize the said Milwaukee and Minnesota Railroad Company were and are as alleged in said complaint, that then, and under such circumstances, the said mortgage to Barnes, the sale under said mortgage, and the organization of the said Milwaukee & Minnesota Railroad Company were each

404 and all fraudulent, illegal, and void, and gave to said company no right, title, or interest of any kind in the property, real or personal, of said La Crosse Railroad Company.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff, by his said counsel, did then and there except.

Said plaintiff further requested the said judge to charge the jury as follows:

Twenty-sixth. The same instruction as to the complaint of Frederick P. James against the La Crosse & Milwaukee Railroad Company, in the circuit court of Milwaukee County.

Which said instruction said presiding judge did then and there refuse

to give, and to which said refusal said plaintiff, by his said counsel, did then and there except.

Said plaintiff further requested the said judge to charge the jury as follows:

Twenty-seventh. The same as to the record of Frederick P. James and others, in the United States court.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff, by his said counsel, did then and there except.

Said plaintiff further requested the said judge to charge the jury as follows:

Twenty-eighth. It appearing by undisputed evidence that the
405 Chamberlain judgment, at the suit of Newcomb Cleveland against Chamberlain, had been declared illegal and void, and that as against said judgments Chamberlain take nothing, it was a fraud on the court for Frederick P. James, claiming as assignee of said Cleveland judgment, to allege in his bill on said judgment that the said Chamberlain judgment and lease were a prior and existing lien on the property of the La Crosse Railway Company, prior to the Cleveland judgment, and to obtain a decree declaring said Chamberlain lease and judgment a prior lien to the Cleveland judgment, and that such decree as against the plaintiff, who was no party to the suit, is fraudulent, illegal, and void.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff, by his said counsel, did then and there except.

Said plaintiff further requested the said judge to charge the jury as follows:

Twenty-ninth. That, as against the plaintiff in this suit, the record of the suit of Frederick P. James against The Milwaukee & Minnesota Railway Company is not evidence to defeat the title of the plaintiff.

Which said instruction the said presiding judge did then and there refuse to give to the jury, and to which refusal the plaintiff, by his said counsel, did then and there except.

406 Said plaintiff further requested the said judge to charge the jury as follows:

Thirtieth. It being undisputed that the deed of the plaintiff to the lands in suit was actually on record at the date of the filing of the bill by Frederick P. James against The Milwaukee and Minnesota Railroad Company, the said plaintiff was a necessary and indispensible party to said suit, and until made a party to said suit, and an opportunity given him to be heard, he cannot be deprived of his legal title by any proceedings in that suit; that the said suits of said James against said Milwaukee and Minnesota Railroad Company, and the decree and sale therein, does not and cannot in any way or manner affect, impair, disturb or destroy the title of said plaintiff in and to said lands in suit.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his said counsel did then and there except.

Said plaintiff further requested the said judge to charge the jury as follows:

Thirty-first. That the decree in the suit of Frederick P. James against the Milwaukee and Minnesota Railroad Company binds and concludes only the parties to that suit, and does not in any way or manner bind or conclude the plaintiff, who was not a party to said suit.

407 Which said instruction said presiding judge did then and there

refuse to give to jury, and to which said refusal said plaintiff by his said counsel did then and there except.

Said plaintiff further requested the said judge to charge the jury as follows:

Thirty-second. That the plaintiff in this suit not having been a party to the suit of Frederick P. James against the Milwaukee & Minnesota Railway Company, can in this action show any defense which he might or could have shown to defeat a decree in the said cause had he been made a party defendant in said suit.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which said refusal said plaintiff by his counsel did then and there except.

Said plaintiff further requested said judge to charge the jury as follows:

In any event, and under any circumstances, the defendant cannot acquire the title of the real estate in question, which is not included within its decree.

Which said instruction said presiding judge did then and there refuse to give to the jury, and to which refusal said plaintiff by his said counsel did then and there except.

408 And the said judge did then and there charge the jury that the defendant had the superior and better title to the lands in suit, and that the defendant was entitled to recover; and to which said ruling and charge said plaintiff did then and there except.

And because the said exceptions and none of them appear in the record of this case, I have at the request of the parties hereto set my hand and seal on this 20th day of March, 1877.

[SEAL.] CHARLES E. DYER,
Dist. Judge.

Filed March 20th, 1877.

EDW. KURTZ, *Clerk.*

Two maps referred to in above bill of exceptions accompany same separately.

JUNE 15, 1877.

This day came the plaintiff, by his attorneys, and filed the bond of Joshua W. Waterman and William J. Waterman, of the city of Detroit, in the State of Michigan, in the penalty of two thousand dollars, conditioned that the said plaintiff shall prosecute a writ of error to effect and answer all costs if he shall fail to make good his plea, which bond is approved by the district judge, and is as follows:

Bond on writ of error.

Know all men by these presents that we, Joshua W. Waterman, of the city of Detroit, 50 Washington avenue, and State of Michigan, and William J. Waterman, of the city of Detroit, 33 Adams av., E., and State of Michigan, are held and firmly bound unto the Milwaukee and St. Paul Railway Company, its successors and assigns, in the sum of two thousand dollars, to be paid to the said The Milwaukee and St. Paul Railway Company, its successors and assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this fifth day of June, 1877.

Whereas the above-named Charles Howard hath prosecuted a writ of error to the Supreme Court of the United States to reverse the
410 judgment rendered in the circuit court of the United States in and for the eastern district of Wisconsin, in a certain cause wherein he, the said Charles Howard, is the plaintiff, and the Milwaukee and St. Paul Railway Company is defendant: Now, therefore, the condition of this obligation is such that if the above-named Charles Howard shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOSHUA W. WATERMAN. [SEAL.]
WILLIAM J. WATERMAN. [SEAL.]

Sealed and delivered in presence of—
BRONSON HOWARD.
CHRISTOPHE HENSIEU.

STATE OF MICHIGAN,
County of Wayne, City of Detroit, ss:

Joshua W. Waterman and William J. Waterman, each for himself, being duly sworn, says that he is worth the sum of two thousand dollars over and above all debts and exemptions, and further saith not.

JOSHUA W. WATERMAN.
WILLIAM J. WATERMAN.

Subscribed and sworn to before me this 5th day of June, A. D. 1877.

BRONSON HOWARD,
Notary Public for Wayne County.

(Endorsed:)
This bond approved this 15th June, 1877.

CHAS. E. DYER,
Dist. Judge.

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

411 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete transcript of record in case of Charles Howard vs. The Milwaukee & St. Paul Railway Company, impleaded with others.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 28th day of August, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 102nd.

[SEAL.] EDWARD KURTZ, *Clerk.*

412 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a

judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Charles Howard, plaintiff, and The Milwaukee & St. Paul Railway Company and others, defendants, a manifest error hath happened, to the great damage of the said Charles Howard, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 101st.

[SEAL] EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. Wis.

(Indorsed:) Filed June 15th, 1877. Edw. Kurtz, clerk.

413 THE UNITED STATES OF AMERICA, *ss:*

To the Milwaukee & St. Paul Railway Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein Charles Howard is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that *in that* behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in the said district, this 15th day of June, A. D. 1877, and of our Independence the 101st.

[SEAL.] CHARLES E. DYER,
Dist. Judge.

I accept service of the above citation this 8th day of August, A. D. 1877.

JOHN W. CARY,
Att'y for Def't in Error.

(Indorsement on cover:) No. 288. Charles Howard, pl'ff in error, vs. The Milwaukee and St. Paul Railway Company et al. E. Wisconsin C. C. U. S. Filed 13th October, 1877.

Supreme Court of the United States.

No. 288.

CHARLES HOWARD,

Plaintiff in Error,

vs.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY,

Defendant in Error.

BRIEF.

H. M. FINCH,
Of Counsel for Plaintiff in Error,
Milwaukee, Wisconsin.

IN SUPREME COURT, UNITED STATES.

CHARLES HOWARD,
Plaintiff in Error.

vs.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Defendant in Error.

This is an action of ejectment. Both parties claim title from the La Crosse & Milwaukee Railway Company. It is admitted that the title of the Real Estate in suit was in the Railway Company at the date of the judgment under which plaintiff claims title, and that defendant was in possession thereof at the time of the commencement of this suit. The value of the land in dispute exceeds $100,000.00.

The plaintiff claims title by virtue of a judgment against the La Crosse & Milwaukee Railway Company, recovered in the Circuit Court of Milwaukee County at the suit of one Sebra Howard. The judgment was recovered on the first day of May, 1858, for $25,586.78, was docketed on that day so that it became a lien on all of the real estate of the Railway Company in Milwaukee County;—execution was issued on this judgment on the 29th day of October 1858, and on that day the lands of the Railway Company now in suit, were levied upon and subsequently sold. No redemption being made the sheriff executed a deed of the lands to the plaintiff in this suit. The deed is dated June 13th, 1862, and was recorded in the office of the Register of deeds of Milwaukee County on the 20th day of November, 1863, at 1½ o'clock P. M.

By the laws of Wisconsin the production of this deed, or a certified copy of it, is prima facie evidence of title, and of the plaintiff's right to recover.

To rebut this *prima facie* case, and to show title in itself the defendant offered in evidence:

First. A mortgage dated June 21st, 1858, (nearly two months after the Howard judgment) executed by the Railway Company to William Barnes, to secure the payment of $2,000,000.00 of bonds, [This mortgage was executed SUBSEQUENT *to the date of the docketing of the Howard judgment.* The Howard judgment was docketed May 1st, 1858.

The Barnes mortgage is dated June 21st, 1858,] together with the proceedings, by Barnes, to foreclose the mortgage by advertisement—the sale by Barnes under these proceedings—the purchase of the property by himself as trustee, and the organization, on the sale, of the Milwaukee and Minnesota Railway Company.

These documents were allowed in evidence against the objection of the plaintiff. (Folio 36, page 16.)

Second. A mortgage dated June 30th, 1864, from the Railway Company to Francis A. Palmer, covering the line of the Railroad from Milwaukee to Portage, and also a supplemental mortgage dated February 18th, 1856. to the same party covering the same property.

These mortgages have never been foreclosed. They were admitted subject to plaintiff's objection.

Third. A mortgage by the Railway Company to Bronson, Soutter & Knapp. dated December 31st, 1856. *This mortgage does not cover the lands in suit.* It covers the Railway line and property from Portage City to La Crosse. Read subject to plaintiff's objection.

Fourth. A mortgage of the Milwaukee, Green Bay and Fond du Lac Railway Company to the city of Milwaukee, dated Sept. 1st, 1853. It covers the *first eighteen miles* of the road from Milwaukee. *It has never been foreclosed;*—admitted subject to plaintiff's objection.

Fifth. A mortgage from La Crosse and Milwaukee Railway Company to the city of Milwaukee, dated July 13th, 1854, for $200,000.00, covers *forty miles* of the road commencing in Washington County. It does not cover the lands in suit, and is *not foreclosed;—admitted subject to plaintiff's objection.*

Sixth. Mortgage of the Railway Company to Bronson and Soutter dated August 17, 1857, for $1,000,000.00, mortgages entire property from Milwaukee to Portage. *Not foreclosed*;—admitted under objection of plaintiff.

Seventh. A lease from the Railway Company to Selah Chamberlain, dated 26th day of September, 1857. For full statement of this lease, see page 18, printed case. As this lease was surrendered by Chamberlain and was also adjudged as fraudulent as to Chamberlain, and Chamberlain directed to surrender possession to the Receiver of the La-Crosse and Milwaukee Railway Company, it does not appear to be any evidence to defeat plaintiff's *prima facie title;*—admitted subject to plaintiff's objection.

Eighth. A judgment against the Railway Company in favor of Selah Chamberlain recovered on the 2d day of October, 1857. *No sale under this judgment;*—admitted subject to objection.

Ninth. A judgment against the Railway Company in favor of Newcomb Cleveland, docketed on the 7th day of October, 1857, for $111,727.11 and $544.15 costs.

☞ There never was a sale *at law* on this judgment. Frederick P. James, claiming to be the owner of this judgment, filed a bill on the equity side of the Circuit Court of the United States, District of Wisconsin, against the *Milwaukee and Minnesota Railway Company only*, and obtained in that suit a decree of sale on this judgment. *Howard, the plaintiff, was no party to this suit. This suit was commenced more than two years after Howard's deed was on record.*

This judgment, and the pretended assignments thereof to James, were read in evidence subject to plaintiff's objection.

Tenth. The bill of Frederick P. James against the Milwaukee and Minnesota Railway Company, being the bill filed on the Cleveland judgment. This bill was filed April 18th, 1866, more *than two years after Howard's deed was recorded. Howard was no party to this suit.*

He has never had an opportunity to be heard on the allegations contained in this bill. James also filed a supplemental bill in the same suit. The original bill, supplemental bill, the answers of the Milwaukee and Minnesota Railway Company thereto, the decree of the Court, the sale and confirmation of sale, are printed in full from pages 21 to 37 of the printed case.

The decree describes the property to be sold as "all and singular the Railroad formerly known as the La Crosse and Milwaukee Railroad from Milwaukee to Portage City, its depots, station-houses and buildings, together with all its rolling stock, franchises and appurtenances, now *in the possession of* or claimed by the defendant, the Milwaukee and Minnesota Railroad Company."

It will be observed that this decree does not, in terms, describe any specific real estate, and does not, in terms, order a sale of all the interest of the La Crosse and Milwaukee Railway Company *as of the date of October 7th* 1857, the date of the Cleveland judgment. It simply adjudges the judgment of Cleveland a lien as of that date, but orders a sale in the language above quoted. The report of sale adopts the language of the decree, and the deed of the Marshal conveys "*the premises mentioned and described in said decree.*"

The records of this suit were all objected to for the reason that said suit was commenced on the 18th day of April, 1866, *long after the recording of the sheriff's deed to Charles Howard*, which deed was recorded on the 20th day of November, 1863, at 1:30 o'clock P. M., "that said suit is against the Milwaukee and Minnesota Railway Company only, and not against the La Crosse and Milwaukee Railroad Company and is a suit in which no other party is named as defendant except the Milwaukee and Minnesota Railroad Company, and as against this plaintiff the said record should not and cannot be used to wipe out the legal title which the plaintiff acquired under his deed recorded November 20th, 1863."

This objection was overruled and the records admitted.

Eleventh. For the purpose of showing that the La Crosse Railway Company ceased to exist as a corporation, defendant was allowed to introduce the book of records of the directors of that Company, showing the last meeting of the directors as entered on the book, to have been on the 14th day of February, 1859, and that no minutes of any subsequent meetings were recorded therein. This was followed by the statement of facts at folios 91, 92, pages 37 and 38 of the printed case. This statement shows that Hans Crocker, on the 11th of June, 1860, by order of the United States Court, was appointed receiver of the LaCrosse and Milwaukee Railroad Company, and on that day took possession of the Railroad and property of said Company, and the book produced was the last book of minutes of said company.

The book and statement were read in evidence subject to plaintiff's objection.

Twelfth. The defendant read in evidence, subject to plaintiff's objection, the record of a suit brought by Bronson & Soutter in the Circuit Court of the United States, to foreclose the mortgage dated August 17th, 1857. Sebra Howard was made a party defendant in this suit, and Charles Howard, the plaintiff in the present suit, appeared in the suit. The Milwaukee and Minnesota Railway Company was also named as a defendant in that suit. During the progress of this suit the order commencing at folio 93, page 38, was made. This record was accompanied with the statement of Mr. Cary, commencing at folio 96.

It is to be observed that this mortgage *has never been foreclosed.* No final decree or sale under a decree was ever made in this cause. The order (folio 93, page 38) gives permission to the Milwaukee and Minnesota Railway Company to enter into possession of a portion of the Railroad of the La Crosse and Milwaukee Railway Company from Milwaukee to Portage city, on complying with certain conditions specified in the order. The conditions were complied with and the Milwaukee and Minnesota Railway Company went into possession of so much of said property as allowed by said order, and remained in possession until March 6th, 1867, when on presentation of the order of confirmation of sale under the decree in the suit of James vs. The Milwaukee and Minnesota Railway Company, the property was delivered by the Minnesota Railway Company, on demand of defendant in this suit, the defendant being the purchaser on the sale under the James decree, and since that date the defendant has been in possession of the property, claiming title by virtue of said decree and sale.

The record and statement were admitted subject to the objection of plaintiff.

Thirteenth. Various witnesses were called by defendant, who testified that the lands in suit were necessary for Railway purposes, and that most of them were used by the Milwaukee and Minnesota and La Crosse and Milwaukee Railway Company as part and parcel of the Railway.

Fourteenth. Counsel for defendant made the statement, at folio 154, page 61, of the printed case, and introduced the record of a suit commenced by Sebra Howard on the 5th day of January, 1860, in the U. S. Circuit Court. This suit was a creditor's bill against the La Crosse and Milwaukee Railway Company. Such proceedings were had in this suit that on the ninth day of June, 1869, Hans Crocker was appointed Receiver of all the Railroad and property of the La Crosse and Milwaukee Railway Company. The only parties to this suit were the La Crosse and Milwaukee Railway Company and Selah Chamberlain. Under that order, and the order in the foreclosure suits of Bronson, Soutter & Knapp, and Soutter & Bronson, Hans Crocker, on the 11th of June, 1860, took possession of the Railroad and its property, as Receiver of the Railway Company. *By this order Chamberlain was directed to deliver up the possession of the Railroad and property under his lease to Crocker.* Crocker, as Receiver, continued in actual possession under these orders, until June 12, 1863,

when he surrendered formal possession of the property to the defendant in this suit, and defendant operated the same, accounting to him, however, for earnings, until the delivery of the Eastern division of the Railroad to the Milwaukee and Minnesota Railway Company, as hereinbefore stated. The Milwaukee and Minnesota Railway Company surrendered possession to defendant in March, 1867, on demand and production of order of confirmation of sale and Marshal's deed in the James suit. The defendants rested their case on this evidence of title. A motion was made to strike out all of the record evidence offered by defendant. Motion denied and plaintiff excepted. (Folio 167.)

The plaintiff, to rebut the evidence of defendant, thereupon called as a witness John W. Cary, attorney of the defendant, who gave evidence that he was a member of the law firm of Cary & Pratt; that said firm were the attorneys of the Milwaukee and St. Paul Railway Company; that as such attorneys they signed a summons in the case of the Milwaukee and St. Paul Railway Company against the La Crosse and Milwaukee Railway Company, William Barnes, the Milwaukee and Minnesota Railway Co. and others; that the suit was commenced by authority of that Company. The suit was commenced on the 27th day of July, 1864, in the Circuit Court of Milwaukee County. The summons was served on the La Crosse and Milwaukee Railroad Company, by delivering a copy to Daniel Wells, Jr., President of the Company. [The Court will observe that although the defendant claims that by the record book of the Directors of the La Crosse and Milwaukee Railroad Company, that corporation ceased to exist on the 26th day of May, 1859, it commenced this suit on the 27th day of July, 1864, and served the summons on its then President, Daniel Wells, Jr.!]

The complaint in the cause is verified by the Secretary of the Milwaukee and St. Paul Railway Company. It is deemed by the plaintiff such an important document that it is printed in full on pages 78 to 94.

It is necessary to here call the attention of the Court to dates.

The equity suit of James vs. the Milwaukee and Minnesota Railway Company was commenced in the United States Court on the 18th day of April, 1866. On the 27th day of July, 1864, long prior to the filing of the James bill in the United States Court, the Milwaukee and St. Paul Railway Company had filed this complaint in the Circuit Court of Milwaukee County, setting out the whole *history of the fraudulent execution of the Barnes Mortgage, the fraudulent advertisement and sale, by Barnes, and the fraudulent organization of the Milwaukee and Minnesota Railroad Company on that sale.* The Court has only to read the allegations of this complaint at folios 187 to 189 to see the gross character of the fraud charged in this complaint, *by the Milwaukee and St. Paul Railway Company.*

But in order to make the evidence of the fraud doubly strong against the defendant in this suit, the plaintiff gave evidence tending to show that the equity suit of James against the Milwaukee and Minnesota Railway Company in the United States Court, was instituted by this very Milwaukee and St. Paul Railway Company upon a

judgment paid by said Company out of property of the La Crosse Railway Company.

The evidence offered on this point will be found at folios 368 to 370 and folios 374 to 377.

Nor was this all the evidence of the fraudulent inception and character of the equity suit of James vs. the Milwaukee and Minnesota Railway Company. The plaintiff read in evidence the record of a suit commenced in the United States Circuit Court, by this same Frederick P. James, with others, against the La Crosse and Milwaukee Railway Company, the Milwaukee and Minnesota Railway Company and Selah Chamberlain. The summons in this suit was served on Daniel Wells, Jr., President of the La Crosse Railway Company on the 22d day of April, 1863, although the Company had, by the minute book of the directors, produced by defendant, and read in evidence, ceased to exist on the 26th day of May, 1859!! This suit was hotly contested. James and his co-complainants sought by this bill to set aside the mortgage of the La Crosse and Milwaukee Railway Co. to Barnes, the sale by Barnes, the organization of the Milwaukee and Minnesota Railway Company on that sale, etc. The Milwaukee and Minnesota Railway Company appeared by able counsel and vigorously defended the suit. The bill was dismissed by the Circuit Court, and an appeal was taken to the United States Supreme Court, and is reported in 6th Wallace, page 752. The decree of the Circuit Court was reversed. The entire proceedings, and *the final decree of the Court are printed in full* from folios 242 to 305, pages 94 to 118 of the printed case. The decree of the court was entered on the 9th day of July, 1868, and among other things adjudges "that *said foreclosure and sale of said Barnes Mortgage be and the same hereby is set aside, vacated and annulled, and the said defendant, the Milwaukee and Minnesota Railroad Company, is perpetually restrained and enjoined from setting up any right or title under it to the said railroad of the said La Crosse and Milwaukee Railroad Company, its rolling stock, fixtures and appurtenances, or to any of the property, real, personal or mixed, of said Railroad Company, or of the income of said railroad.*" What *title* to these lands had the Milwaukee and Minnesota Railway Company after this decree?

And as further evidence of the fraudulent inception and character of the James bill against the Milwaukee and Minnesota Railway Co. in the United States Court, it will be observed in this bill, at folio 56, that the complainant, James, prays that the property may be sold *subject to prior liens*, and as *a lien prior to the Cleveland judgment* he claims "*the lease and judgment to Selah Chamberlain.*" To show the fraudulent character of this claim, and that the Chamberlain lease and judgment was *not a prior lien to the Cleveland judgment*, the plaintiff read in evidence the record of the suit of Cleveland, original judgment creditor, against the La Crosse and Milwaukee Railway Company and Selah Chamberlain, to annul, vacate and set aside the Chamberlain judgment and lease, [folio 308, page 118 to folio 310, page 119,] and the decree granting the relief. James is *the assignee* of Cleveland, and as assignee of Cleveland asserts the validity of a lease and judgment which his assignor, Cleveland, after a long and severe

contest, had procured to be adjudged null and void, and of no force or effect whatever as against the Cleveland judgment. It would seem as if this fact, of itself, would be conclusive evidence of the FRAUDULENT inception and character of the equity suit of James vs. Milwaukee and Minnesota Railway Company, to sell the property of the La Crosse Railroad Company on the Cleveland judgment. The evidence of defendant's attorney, at folio 374 to folio 380, will not escape the attention of the Court. But this was not all of the evidence of the fraudulent attempt of James and the defendant, to use the Cleveland judgment and the Chancery suit to obtain unlawfully the title to this property. Plaintiff further offered in evidence the record of a suit commenced by said James on the 14th day of July, 1864, against the La Crosse and Milwaukee Railway Company, (nearly two years before his suit in the United States Court against the Milwaukee and Minnesota Railway Company), in the Circuit Court of Milwaukee County, and in which the summons was served on David Wells, Jr., President, seeking a sale on certain judgments mentioned in his complaint, and in which complaint said James sets out the plaintiff's judgment against the La Crosse and Milwaukee Railroad Company, *and the sale under that judgment*, and also alleges (folio 324) that "said plaintiff has heard and been informed that said mortgage so given to said Barnes *was fraudulent; that said pretended foreclosure was irregular and of no validity; that said purchase by Barnes was unauthorized, and that the title to said property never passed to said Barnes or to said pretended Milwaukee and Minnesota Railroad Company; and that the equity of redemption is still in the La Crosse and Milwaukee Railroad Company;* as to the truth of all which said plaintiff is not particularly informed, and therefore leaves said defendant, Milwaukee and Minnesota Railroad Company to make such proof in the premises as it may be advised; *that said pretended Milwaukee and Minnesota Railroad Company have never had possession or control of said mortgaged property, or any part or portion thereof*, etc., etc. This complaint was verified by said James.

Said plaintiff furthered offered in evidence the record of a judgment against the La Crosse Railroad Company at the suit of Sebra Howard, recovered in November, 1859, in the United States Circuit Court. Execution issued with return of no property found. Also a creditor's bill filed in the United States Court on that judgment, and service on the La Crosse and Milwaukee Railroad Company, by serving Newcomb Cleveland, its President, on the 18th day of January, 1860, and showing that on the 9th of June, 1860, an order was entered in that suit appointing Hans Crocker, Receiver, and Selah Chamberlain was by said order directed to deliver to said Crocker, possession of the Railroad and property of the La Crosse Railroad Company.

Defendant also gave evidence tending to show that large portions of the land in suit *were not used or occupied for Railroad purposes* in 1867, and were not therefore covered by any description of property in the decree of James vs. Milwaukee and Minnesota Railway Company.

The judge instructed the jury that defendant had the better title to the real estate in suit, and directed verdict for defendant.

There are exceptions to the introduction of the record evidence offered by defendant, to the refusal to give instructions asked by the plaintiff, and to the direction of the judge to return a verdict for the defendant.

In the view which the counsel of the plaintiff takes of the case, the principal point is whether the trial Court should have admitted, on behalf of defendant, the record of the equity suit of James vs. the Milwaukee and Minnesota Railroad Company, in the United States Court, *as evidence to cut off and destroy the legal title of Howard.* But as it is possible that defendant may claim that even if that record is excluded it was entitled to the possession of the real estate as against Howard, I have concluded that it is best to assign as error all the principal exceptions which appear on the record.

ASSIGNMENT OF ERRORS.

The plaintiff assigns as errors in the record the following, to wit:

First. The admission of the mortgages to William Barnes, and proceedings to foreclose the same, the sale under such proceedings, and the organization on such sale of the Milwaukee and Minnesota Railway Company. These are all subsequent to the date of the Howard judgment on which the sale of the property in suit was made, and on which sale the deed to plaintiff was executed.

Second. The several mortgages executed to Palmer, Bronson, Soutter & Knapp, Bronson & Soutter, the city of Milwaukee and the suits thereon, as none of said mortgages, *covering the property in suit*, were ever foreclosed, and no sale has ever been made of the equity of redemption of said mortgages.

Third. The record of the judgment of Selah Chamberlain and the lease to him. There never was a sale under this judgment, and both lease and judgment were declared void as to Cleveland judgment.

Fourth. The record of the Cleveland judgment and the equity suit of James on that judgment against the Milwaukee and Minnesota Railway Company. *Howard was no party to the suit.*

Fifth. The admission of the statement of the witness, Cary, as to the taking of possession of the property by the defendant under the sale on the decree in the suit of James against the Milwaukee and Minnesota Railway Company.

Sixth. To the charge of the judge that the defendant has the title to the real estate in suit and directing a verdict for the defendant.

Seventh. To the refusal of the judge to give each of the following instructions asked by plaintiff, to wit:

1st. That the plaintiff, Howard, having recovered a judgment in the Circuit Court of Milwaukee County, on the 1st day of May, 1858, for $25,586.78, and which judgment was docketed on that day, and having issued execution and sold the lands mentioned and described in the deed read in evidence, which was recorded November 20th, 1863, the plaintiff is entitled, under and by virtue of the laws of the State of Wisconsin, to recover all of the lands mentioned in that deed, which were owned by the La Crosse and Milwaukee Railroad Company at the date of the rendition of said judgment, in this present action.

2d. That the defendants, by the records which they have introduced in evidence, have failed to establish any legal title in or to any of the lands mentioned in the said deed of said Howard as against the said Howard except the tracts of land for which Mr. Cary offered deeds, and that portion of the premises in Block 41, which it is conceded was occupied and has been all of the time occupied by Mariner or his tenants.

3d. That under the decree in the suit of Frederick P. James vs. the Milwaukee and Minnesota Railroad, the defendant is not entitled to recover any lands or real estate mentioned in the plaintiff's deed except such lands or real estate as was actually used and occupied at the date of said decree by the Milwaukee and Minnesota Railroad Company as railroad depots, station buildings, and appurtenances.

4th. That land cannot be appurtenant to land and therefore, under the grant or description of lands specified in the decree in the suit of James against the Milwaukee and Minnesota Railroad Company, the defendant is entitled to none of the property in question, under that decree, except the main line of the railroad and the buildings actually occupied as depots and station buildings, except that portion of the premises for which Mr. Cary has offered deeds, and that portion of the premises in block 41 which it is conceded was occupied, and has been all the time occupied by Mr. Mariner or his tenants.

5th. That the burden of proof is upon the defendant to satisfy the jury from the evidence that any portion of the premises mentioned in the decree was actually used and occupied by the Milwaukee and Minnesota Railroad Company, as railroad, depot and station buildings.

6th. That under the word "appurtenances" in said decree the defendant cannot take title to any lot or part of a lot adjacent to, or connected with, depot or station buildings, unless as an absolute necessity for ingress and egress into and from the buildings so occupied.

7th. That in no event and under no circumstances can the defendant in this suit recover any portion of the property east of the railroad track as marked on the map, and noted as "open dock yard," under the pretence that it is an "appurtenant" to the railroad; the same as to the west half of lots 8, 9 and 10, block 41, or at least so much of these lots as are west of the line marked in lead pencil under the pretense that they are appurtenant to the railroad or station buildings.

8th. That all of the property in block 41, east of the railroad track, marked "Higby's Elevator" is not conveyed by the terms of the decree, and will not be covered or be passed under the word "appurtenant," to the railroad.

9th. That all of lots 1, 2, 3, 4 and 5, block , which were owned by the LaCrosse Railroad Company at the date of the docketing of the judgment of Sebra Howard, will not pass under the decree as they are not described as real estate, and they are only claimed as part and parcel of the railroad and are not and cannot be legally appurtenant to the railroad.

10th. That under the term "Depot," as used in the decree, the defendant cannot recover the real estate upon which the depot building stands.

11th. That the jury are instructed upon the evidence that no portion of lot 10, in block 40, except twenty feet west of the iron rail, is included within the terms of the grant.

12th. That all of lot 9, as marked on this map, is not within the terms of the language of the decree.

13th. That the jury are instructed that all that appears on the map, in block 40, east of the railroad track, marked "Tibbets & Starkweather's salt warehouse," is not included in the terms of the decree, and is not an "appurtenant" to the railroad.

Same instruction as the last, as to block 33, same ruling, same exception.

14th. That in any event the defendant is not entitled to recover as to lot 10, under the description in his decree, anything more than that portion of the lot which has endorsed upon it "Frame building occupied by Thomas Cramer, etc."

15th. That in no event and under no circumstances can the defendant recover, in this cause, any of the lands which are marked in red upon the maps offered in evidence, which were not actually used and occupied by the Milwaukee and Minnesota Railroad Company at the time of the decree in the James case.

16th. That a railroad company, seeking to acquire the title to property for the purposes of its railway, is confined simply and only to that which is actually necessary, and that it is not entitled to take property simply because it may be convenient for the uses and purposes of the railroad company.

17th. That if there is any ambiguity or doubt in the construction of the language of the decree in the case of James against the Milwaukee and Minnesota Railroad Company as to what passed by the terms of that decree, as said decree was obtained by an ex parte proceeding, to which Howard was no party, and as the defendant has selected its own language to express its own grant, that under such circumstances the language must be construed strictly against the defendant, that in this instance the defendant can take the title to no real estate not mentioned in the grant merely by implication, and cannot claim, under the language of the grant, that they have any title in or to any of the property connected with the railroad line that is not strictly "appurtenant" to that line, and that to acquire it as an appurtenance to the line the jury must be satisfied from the evidence that property so claimed as appurtenant was indispensably necessary to the use of the road.

18th. If the jury find from the evidence that the Barnes mortgage (so-called) was executed in fraud of the rights of the creditors of the La Crosse Railroad Company, and that the proceedings of Barnes to foreclose the same were fraudulent, illegal and void, and that the organization of the so called Milwaukee and Minnesota Railroad Company was under the foreclosure of the Barnes mortgage, that then and under such circumstances, the said defendant can acquire no valid title to the lands in suit as against the plaintiff, under or by virtue of the suit of Frederick P. James against the Milwaukee and Minnesota Railroad Company.

19th. That after the recording of the sheriff's deed to How-

ard, the possession of the so-called Milwaukee and Minnesota Railroad Company was in law the possession of Howard, and as against the title of Howard under said deed, said posession, by said Milwaukee and Minnesota Railroad Company, was wrongful and tortious.

20th. That before the defendant in this action can establish title to the lands in suit under and by virtue of the decree in the case of James against the Milwaukee and Minnesota Railway Company, and a sale under that decree, the jury must find from the evidence that James was the bona fide assignee of the Cleveland judgment on which said bill was filed.

21st. If the jury find from the evidence that the assignment of the Cleveland judgment, by the Milwaukee and St. Paul Railway Company, to Frederick P. James, was never delivered to said James, that then the said defendants can claim no title to the real estate in question, under or by virtue of said decree, in said suit of James against the Milwaukee and Minnesota Railroad Company, or the sale under the said decree.

22d. If the jury find from the evidence that at the time of the commencement of the suit of Frederick P. James against the Milwaukee and Minnesota Railway, the said railway company was in fact the owner of the said Newcomb Cleveland judgment, and that said suit was prosecuted by the general attorney of the said Milwaukee and St. Paul Railway Company, and for the benefit of said company, that then, and under such circumstances, the said suit was a fraud upon the jurisdiction of the United States Court, and the proceedings in said suit, in said court, are illegal, null and void.

23d. If the jury find from the evidence that the Milwaukee and St. Paul Railway Company purchased the Cleveland judgment, after its organization, on the sale of the so-called western division of the La Crosse and Milwaukee Railroad, and after it had become the owner of said division of said road, and paid for the same in part in income bonds (so-called), that then, and under such circumstances, the said judgment was in law fully paid and extinguished, and said railroad company could not thereafter institute any suit upon said judgment, or assign said judgment to any party to bring suit thereon, in order to obtain a title under or by virtue of any decree or sale had on such judgment.

24th. Upon the undisputed evidence given in this case, as to the purchase of the said Cleveland judgment by the Milwaukee and St. Paul Railway Company, the said Cleveland judgment was paid and extinguished by said company, and under the proofs in this case, the said railway company could not use the said judgment to obtain a title to the lands, property, or franchises of the La Crosse and Milwaukee Railway Company.

25th. The record of the complaint of the suit of the Milwaukee and St. Paul Railway Company against the La Crosse and Milwaukee Railroad Company, in the Circuit Court of Milwaukee County, is proper evidence to go to the jury in this cause of the facts stated in said complaint, and if the jury find from the evidence that the Barnes mortgage, so-called, was issued at the time and in the manner alleged in said complaint, that the facts as to the attempted

foreclosure of said mortgage are as stated in said complaint, and that the proceedings to organize the said Milwaukee and Minnesota Railroad Company were and are as alleged in said complaint, that then and under such circumstances, the said mortgage to Barnes, the sale under said mortgage, and the organization of the said Milwaukee and Minnesota Railroad Company were each and all fraudulent, illegal and void, and gave to said company no right, title or interest of any kind, in the property, real or personal, of said La Crosse Railroad Company.

26th. The same instruction as to the complaint of Frederick P. James against the La Crosse Railroad Company, in the Circuit Court of Milwaukee County.

27th. The same as to the record of Frederick P. James and others in the United States Court.

28th. It appearing, by undisputed evidence, that the Chamberlain judgment, at the suit of Newcomb Cleveland against Chamberlain, had been declared illegal and void, and that as against said judgment, said Chamberlain take nothing, it was a fraud on the court for Frederick P. James, claiming as assignee of said Cleveland judgment, to allege in his bill on said judgment that the said Chamberlain judgment and lease were a prior and existing lien on the property of the La Crosse Railway Company, prior to the Cleveland judgment, and to obtain a decree declaring said Chamberlain lease and judgment a prior lien to the Cleveland judgment, and that such decree as against the plaintiff, who was no party to the suit, is fraudulent, illegal and void.

29th. That as against the plaintiff in this suit, the record of the suit of Frederick P. James against the Milwaukee and Minnesota Railway Company is not evidence to defeat the title of the plaintiff.

30th. It being undisputed that the deed of the plaintiff to the lands in suit was actually on record at the date of the filing of the bill by Frederick P. James against the Milwaukee and Minnesota Railroad Company, the said plaintiff was a necessary and indispensable party to said suit, and until made a party to said suit, and an opportunity given him to be heard, he cannot be deprived of his legal title by any proceedings in that suit; that the said suit of said James against said Milwaukee and Minnesota Railroad Company, and the decree and sale therein, does not and cannot in any way or manner affect, impair, disturb or destroy the title of said plaintiff in and to said lands in suit.

31st. That the decree in the suit of Frederick P. James against the Milwaukee and Minnesota Railroad Company binds and concludes only the parties to that suit, and does not, in any way or manner, bind or conclude the plaintiff, who was not a party to said suit.

32d. That the plaintiff in this suit, not having been a party to the suit of Frederick P. James against the Milwaukee and Minnesota Railway Company, can, in this action, show any defense which he might, or could have shown, to defeat a decree in the said cause, had he been made a party defendant in said suit.

33d. In any event, and under any circumstances, the defendant cannot acquire the title of the real estate in question, which is not included within its decree.

ARGUMENT.

Charles Howard, the plaintiff, by virtue of the judgment of Sebra Howard against the La Crosse and Milwaukee Railroad Company, the sale thereon, and the sheriff's deed, acquired all the right, title and interest which the La Crosse and Milwaukee Railway Company had in the lands in this suit, on the first day of May, 1858. It is conceded that the Railway Company had the title to these lands on that day. Howard then acquired, as against the Railway Company, the title to the lands in suit.

I.

The mere production of the sheriff's deed, by the laws of Wisconsin, established, *prima facie*, the legal title of the lands in suit in the plaintiff.

Ehle vs. Brown, et al, 31st Wis., 412. "By the provisions of chapter 40, laws of 1869, section 1," say the Wisconsin Supreme Court in the above cited case, "the sheriff's deed is made *prima facie* evidence that the title of the person, or persons, against whom judgment was rendered, and by virtue of which the sale and deed purport to have been made in the lands and real estate described in such deed, passed to, and vested in, the grantee or grantees in such deed, and this without making other proof, *either of the judgment or sale than that furnished by the deed.*"

"We think that a fair construction of the law of 1869 requires us to hold that when the defendants read the sheriff's deed, or rather a certified copy of the record thereof in the trial, they thereby proved, *prima facie*, that there was a valid judgment in the foreclosure action, and that there had been a valid sale of the lot pursuant thereto, and that the conveyance upon such sale was executed by the proper officer."

The plaintiff, then, by the production of the deed, has made out a *prima facie* case. He has shown a legal title to the real estate in suit. Had the defendant offered no evidence, the plaintiff, upon the proofs made, would have been entitled to a verdict.

By the laws of Wisconsin, in force at the time the judgment of Howard was docketed, the judgment was a lien on all of the real estate of the Railway Company in Milwaukee County.

This point was expressly decided in the case of the *Railway Company vs. James*, 6th Wallace, 750.

On page 752, Justice Nelson says, "By the statute law of Wisconsin, judgments are liens on real estate, and we do not doubt but that this judgment *became a lien on the road from the time of its rendition*, and that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by this court, passed the whole of the interest of the company existing at the time of its rendition to the purchaser."

II.

The only title the defendant has exhibited to destroy the legal title of the plaintiff, is the execution of a mortgage by the judgment debtor,

the La Crosse and Milwaukee Railway Company, to William Barnes, *subsequent in time to the docketing of the Howard judgment, under which plaintiff claims title*, a sale under that mortgage, the organization of a corporation on such sale called the Milwaukee and Minnesota Railway Company, claiming to be the successor of the La Crosse and Milwaukee Railway Company, a suit in chancery by one Frederick P. James against the Milwaukee and Minnesota Railway Company only, on the equity side of the United States Court to procure a sale on a judgment against the La Crosse and Milwaukee Railway Company, prior in date to the Howard judgment, a decree in that suit, a sale on that decree, and a deed of the Marshal on that sale. Howard was no party to that suit. His deed had been on record for two years or more prior to the commencement of the James suit, and James had himself, in a complaint, filed in the Circuit Court of Milwaukee County, verified by himself, long before his suit in equity was commenced in the United States Court, set out the Howard judgment *and sale under it*, thus showing that he was fully informed that Howard had made a sale of the real estate of the La Crosse Railway Company on the judgment of Sebra Howard. The defendant now insists that by the proceedings in this equity suit, to which plaintiff was not a party, it has acquired a *better title* to the lands in suit than plaintiff has established.

In other words, to state the defendant's position more pointedly, the legal title of Howard is annulled, vacated and set aside by a suit in equity to which he was not a party, and when he has been guilty of no fraud or negligence.

It would seem as if the bare statement of the proposition was a sufficient argument against it.

Waiving, for the present, all questions of fraud and bad faith on the part of James, or the defendant, and *assuming* that everything James or the defendant have done is honest and free from fraud, then we find this state of facts: James has a valid judgment which is a prior lien on the real estate of the La Crosse and Milwaukee Railway Company to the lien of the Howard judgment. Instead of selling the real estate on his said judgment on execution, he institutes a suit on the equity side of the Court against the alleged successor of that company, the Milwaukee and Minnesota Railway Company, which is in possession of the real estate, well knowing that Howard has sold that same real estate on his judgment and obtained *the legal title thereto, and, without making Howard a party to his suit*, obtains a decree of sale in the equity suit, on his prior lien, makes a sale on that decree, obtains a deed, and then claims that by that proceeding he has wiped out and annihilated Howard's title! The Circuit Court sustains the claim, and the legal title of Howard is thereby destroyed by a proceeding to which he was not a party. Howard is condemned without trial or hearing. This I say is the legal effect of the decision of the trial court *assuming* good faith in James and the defendant. If the conduct of James or the defendant was actually *fraudulent and corrupt*, then the ruling which gives the fraudulent and corrupt actors such decided advantages over an honest creditor will appear more strange and remarkable.

Now I ask, if, *assuming* good faith, any such legal result can flow from such acts of James or the defendant?

Howard, the plaintiff in this suit, once had a legal title to these lands. He could lose that title only by his own voluntary act, or by the judgment of a competent tribunal having jurisdiction of his person, or by sale on execution on an unpaid judgment, prior to his own, and which was a valid lien on the same land.

But I deny that he can be deprived of the legal title he thus holds to the lands *by a proceeding in equity to which he is not a party.* He must have a hearing, or an opportunity to be first heard. Any rule which would impair or destroy his legal title without hearing, or opportunity to be heard, would savor of the worst form of barbaric wrong and oppression.

It is plain that Howard, as against either the La Crosse and Milwaukee Railway Company, or the Milwaukee and Minnesota Railway Company, had the *legal title* to the lands in suit at the time this equity suit of James against the latter company was commenced. He had obtained all the title of the La Crosse and Milwaukee Railway Company in the lands in suit, by a valid sale on a valid judgment, prior to the so-called Barnes mortgage. The time of redemption had expired. No redemption being made he obtained a sheriff's deed of the land. This deed related back to the date of his judgment.

Now, had Howard brought an ejectment suit against either of these Railway Companies, he would have recovered. How, then, does it happen that he is defeated? When and how, and by what proceeding was his legal title wiped out? By any sale on execution, and redemption expired? No! It is said that he has lost his legal title by a sale on a decree obtained on a judgment prior to the Howard judgment at the suit of James vs. the Milwaukee and Minnesota Railway Company to *which Howard was not a party.*

The decisions are many and numerous that Howard's legal title could not thus be wiped out or destroyed. *The record of such a decree is no evidence against Howard for any purpose whatever.* It is, as to him, a nullity. His rights are the same in all and every respect as if the James suit had not been instituted, and the decree therein had not been obtained. It is void for want of notice to him. He is entitled to notice and an opportunity to be heard before his rights can be impaired.

One of the earliest reported cases is the case of the *King vs. The Chancellors*; 1st Strange, 557. In that case FORTESCUE, J. says:

"Besides, the objection for want of notice can never be got over; *the laws of God and man both give the party an opportunity to make his defense, if he has any.* I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defense; Adam, says God, where art thou? hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

In *Lessee of Hickey, et al., vs. Stewart et al.*, 3d Howard, 759, it was held that the record of *a decree in chancery* and a sale under the decree was void for want of jurisdiction of the person and

the subject matter, and that, too, on the trial of an ejectment suit, where the record was relied on as evidence of title. In the opinion on page 759 it is said: "The defendant in ejectment can never defend his possession against the plaintiff upon a title in himself by which he could not recover the possession, if he were out and the plaintiff in possession. Reversing the position of the parties in this case, could the defendants, if plaintiffs, recover the land in controversy upon this decree, and evidence of possession under it against the title of the plaintiffs? We have no hesitation in saying they could not; and therefore, the decree, if founded upon a valid, equitable title, would be no legal bar to the action of the plaintiff."

In *King vs. Bill*, 28th Conn., 597, the court say: "The general principle of law that a judgment or *decree* binds or affects only the parties to the case in which it was rendered, or their privies, *would exclude the introduction of the decree in favor of Bill against the plaintiff, as the latter was not made a party in that case.*"

In *Smith vs. Orton*, 21st Howard 243, the court say: "And as neither Gruenhagin, Brown nor Smith were parties to the suit of *Orton against Knab, the decree against Knab did not in any wise impair the equity* obtained from Hubbard, who likewise was no party to the suit and who had conveyed to Gruenhagin before it was commenced."

In the matter of Howard, 9*th Wal.* 183, Justice FIELD says "The judgment of an inferior court, when affirmed by this court, is only conclusive as between the parties, upon the matters involved. * * * None of the cases suggest even the proposition that the judgment or *decree affirmed concludes the rights of third parties not before the Court or in any respect affects their rights. It would have been against all principle and all reason had they asserted anything of the kind.* There is indeed, a class of cases affecting the personal status of parties in which a judgment necessarily binds the whole world. But it is not of those we are speaking. We refer to judgments at law or *decrees in equity affecting rights of parties to property. They bind only the parties before the court, and those who stand in privity with them.*" The entire opinion is a most conclusive argument against the proposition that the decree in the equity suit of James against the Milwaukee and Minnesota Railroad Company only could be used for any purpose to impair or destroy *the legal title* of Howard.

In *Ray vs. Norseworthy*, 21*st Wal.* 136, Justice CLIFFORD says: "No man is to be condemned without the opportunity of making a defense *or to have his property taken from him by a judicial sentence without the privilege* of showing, if he can, that the pretext for doing it is unfounded." * * "Notice in some form, must be given in all cases, else the judgment, order, *or decree*, will not conclude the party whose rights of property would otherwise be divested by the proceeding." * * "Nor is there any well considered case which gives any support to the proposition that the judgment, order, sentence, *or decree of a court, disposing of property, subject to conflicting claims, will affect the rights of any one not a party to the proceeding, and who was never in any way notified of the pendency of the proceeding.*"

The following cases will be found to fully sustain the same principle:

Rodrigues vs. United States, 1st Wal., 591.
Hook vs. Payne, 14th Wal., 255.
Kibbe vs. Benson, 17th Wal., 629.
Lasere vs. Rochereau, 17th Wal., 438.
University vs. Finch, 18th Wal., 110.
Galpin vs. Page, 18th Wal., 368.
Ex parte Robinson, 19th Wal., 505.
Dupasseur vs. Rochereau, 21st Wal., 130.
Windsor vs. McVeigh, 3d Otto, 274.
Humes vs. Scruggs, 4th Otto, 25.
Pennoyer vs. Neff, 5th Otto, 715.
Settlemier vs. Sullivan, 7th Otto, 444.
Noyes vs. Hall, 7th Otto, 34.
Fairfax vs. City Council, 9th Chicago, L. N., 162.
Galpin vs. Page, 3d Sawyer, 93.
Van Epps vs. Walsh, 1st Wood, 609.
Gray vs. Larrimore, 4th Sawyer, 647.
Carney vs. Emmons, 9th Wis., 117.
Hathaway vs. Fullerton, 11th Wis., 287.
Ehle vs. Brown, 31st Wis., 414.
Seifert vs. Brooks, 34th Wis., 447.
Pittsburgh C. St. Ry. Co. vs. Marshall, 85th Pa., 190.
Borders vs. Murphy, 78th Ills., 85.
Cadwallader vs. Harris, 76th Ills., 370.
Hutton vs. City of Camden, 39th N. J. (law), 127.
Cuyler vs. Ferrill, 8th Am. L. Reg., N. S., 107.
Avery vs. Ryerson, 34th Mich., 363.
Stoeckle vs. Ehlers, 37th Mich., 262.
Montgomery vs. Merrill, 36th Mich., 101.

An examination of these cases will clearly establish the proposition of law which I assert, to-wit: That the record of the equity suit of James against the Milwaukee and Minnesota Railway Company was *not admissible in evidence* to impair or destroy the legal title of Howard, the plaintiff, for the reason that Howard was no party to the suit, and had no opportunity to be heard.

"Every man," says Chief Justice COOLEY, in *Stockle vs. Ehlers*, 37th Mich, 263, "is entitled to his day in court before his rights can be legally disposed of."

"A decree given," says GRAVES, J., in *Avery vs. Ryerson*, 34th Mich., 368, "when there was no one in the cause representing the Blake mortgage, could not affect that mortgage."

In *Montgomery vs. Merrill*, 36th Mich., 102, Chief Justice Cooley says, "The requirement of notice is only a matter of common right in such cases, for the party is condemned unheard if an amendment is allowed which gives to the proceedings an effect adverse to his interests, which they did not have before, without being allowed to dispute and disprove the grounds of the action."

In Borders et al. vs. Murphy, 78th Ills., 85, Justice Walker says: "Was William Osborn barred, *or in anywise affected by the decree* and proceedings in partition, had in October, 1854? There is no pre-

tense that he was named in or made a party in that proceeding. He had no opportunity to be heard or have his rights determined. He was not called on to show whether he had rights or not, and if so, what they were. It is a fundamental principal of justice, recognized and acted upon by all courts, that a party cannot be deprived of, or his rights be affected, without having an opportunity to assert or defend them. Hence to bind a party by a judicial sentence, he must be made a party to the proceeding, and must be served with actual or constructive notice of the proceedings, or enter his appearance. It is believed no decision can be found of any respectable court which announces a contrary doctrine. It would be repugnant to every principle of justice, and contrary to all of the adjudications of the courts to so hold. He, not being a party to that proceeding, *is in no sense or manner bound by it, nor was his interest in this land in the slightest degree affected thereby*; and he or his assigns are perfectly free to assert his title, at all times and in all places, *as though the decree and partition had never been had.*"

In Hutton vs. City of Camden, 39th N. J. (law), page 127, it is said that "it is not within the competency of legislation in this state to authorize any tribunal to render a judgment against the person or property of a citizen without a notice, and an opportunity afforded him to be heard." * * * "A judgment in any court without in any wise summoning the defendant WOULD BE VOID; not merely voidable."

In *Cuyler vs. Ferrill*, 8th Am. L. Reg. (N. S.), Erskine, J., says: "It is a principle governing all courts of judication that a judgment of a tribunal which has no jurisdiction of the parties and subject matter, is absolutely void, and must be so treated when the record *is offered in evidence* or used for any other purpose." * * * "My conclusion is that the proceedings for partition by the pretended Superior Court of Chatham County in 1863 and 1864, so far as the rights of complainant are concerned *were utterly void.*"

In *Ehle vs. Brown* 31st Wis. 414, Chief Justice DIXON, says: "Undoubtedly, as a grant, the sheriff's deed did not convey to Hawkins the title of the plaintiff Mrs. Ehle, *for the plain reason* given by counsel, that Mrs. Ehle *was not a party to the foreclosure action and so her title could not be directly touched or affected by it.* Treated merely as a grant the position of counsel is incontrovertible, that neither Hawkins nor any of the other defendants purchasers under him acquired the equity of redemption in the mortgaged premises by virtue of the sheriff's deed alone."

The same judge, in *Seifert vs. Brooks*, 34th Wis. 447, says "That every man is entitled to his day in court and must have it, and cannot be affected in his person *or property* unheard, or without the privilege secured to him of appearing or being represented in his own defence if he so desires, is a maxim the force of which every good lawyer appreciates, *and one which no court ever surrenders.*"

In the case of *Lasere vs. Rochereau* 17th Wal. 438, Justice SWAYNE says: "It is contrary to the plainest principles of reason and justice that any one should be condemned without an opportunity to be heard."

In *Windsor vs. McVeigh*, 3rd Otto 277, Justice FIELD says: "Whenever one is assailed in his person or property, then he may defend for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is *not a judicial determination of his rights and is not entitled to respect in any other tribunal.*"

In *Noyes vs. Hall*, 7th Otto 34, Justice CLIFFORD says: "Parties interested in the premises who were not served with process are not bound by that decree; and it follows that the Respondent, took his title *subject to the rights of the complainant, acquired under the deed just the same as if no decree had ever been made.*"

In *Settlemier vs. Sullivan*, 7th Otto 444, a record of a suit was ruled out in an ejectment suit as not evidence to establish title against one not served with process.

If this point is well taken then the case stands just where it did before the equity suit of James was commenced. *That record excluded and there is no pretence of a legal title in the defendant.* If the record is admitted then its effect is to cut off Howard's legal title by a decree in a suit to which he is not a party, and which all the adjudications affirm cannot be done.

III.

We have thus far, in our argument, *assumed* good faith and no actual fraud on the part of James and the defendant. But I think an examination of the record will show actual and positive fraud on their part. There are authorities which sustain the proposition that Howard, in this action, may show such fraud. In other words not being a party to the equity suit of James, Howard may, if he can, show that the judgment on which the decree was obtained in the equity suit was paid; that James had no title to the Cleveland judgment when he commenced the equity suit, that the proceedings were collusive and fraudulent, and in short anything that will show a defense to the James suit.

Leonard vs. Bryant, 11th Met., 372.
Downs vs. Fuller, 2d Met., 135.
Aikin vs. Morse, 104th Mass. 279.

If then Howard may show actual fraud and collusion the following particulars showing or tending to show such fraud and collusion will be worthy of notice.

1. The judgment of Cleveland was paid before it was transferred to James. (See folio 370.)

If this was actual payment of the judgment then any sale made on that judgment after that payment was null and void.

In *Lee vs. Rogers* 2d Sawyer 559, SAWYER, J. says: "It is settled, without any authority so far as I am aware to the contrary, that a

sale under a judgment, *after a full payment is absolutely void*, and a number of the authorities go so far as to say that such a sale is void under all circumstances and as to all persons even though purchased in good faith, for a valuable consideration, and without notice."

2. The suit was collusively brought in the name of James by the defendant, the Milwaukee and St. Paul Railway Company and prosecuted by that company. See folios 374 to 376, also 380.

3. The books of the Railway company do not show any entry of the transfer of the Cleveland judgment or any payment by James for it.

4. The evidence is conclusive that the alleged transfer of the judgment was a mere sham and pretext and to quote from the evidence: "the principal thing at any rate was to get a decision as between the Railway Company and the *Minnesota Company* in the *quickest time possible.*" "The controlling idea, in commencing the suit was simply this, that the Minnesota Company was the only thing we had to fight, the only party that had been fighting us. *We had acquired all the claims that appeared to contest the matter prior to the claims of the Minnesota mortgage* EXCEPT THIS SALE OF HOWARD'S. This did not occur to me, but the prevailing thing was to commence a suit *and drive it to a decree in the quickest time possible.*" This quotation is from the evidence. Comment is unnecessary!

5. The making the Minnesota Company only a party defendant after James had, years before in verified pleadings, attacked the whole organization of that company as fraudulent.

6. The making the Chamberlain judgment and lease *a prior lien* to the Cleveland judgment after Cleveland had procured a decree that the lease and judgment as to him was a fraud and void.

7. The decree of this Honorable Court, that the Barnes mortgage was fraudulent and the organization under it likewise fraudulent.

IV.

But if the court shall hold that the decree, and sale under it, obtained by James in his equity suit against the Milwaukee and Minnesota Railroad Company is valid and admissible against Howard, so as to impair or destroy his legal title, then the question is presented and will need determination what was actually *adjudged by the decree to be sold and what was actually sold.*

The decree is loosely drawn. It adjudges clearly enough that the Cleveland judgment is a lien as of October 7, 1857. the date of the judgment. But when it comes to adjudge what shall be sold under the decree it simply orders to be sold the "RAILROAD-formerly known as the La Crosse and Milwaukee Railroad from Milwaukee to Portage City, its depots, station houses and buildings together with all its rolling stock, franchises and appurtenances now in possession of or claimed by the defendant the Milwaukee and Minnesota Railroad Company."

1. Does this language adjudge any sale of real estate?
2. Does it adjudge the sale of the right, title and interest which the

La Crosse and Milwaukee Railroad Company had to the lots and blocks in suit as of the date of October 7, 1857?

3. Does it adjudge the sale of the right, title or interest of said Company in any real estate, *not strictly the railroad and its oppurtenances?*

It will be observed that the instructions of the plaintiff numbered from the *third* to the *seventeenth* inclusive, were drawn to meet these points.

By examining the maps, made a part of the bill of exceptions, and the testimony of the witness Elsner, commencing at folio 330, it will be seen that a large number of the lots and blocks claimed by plaintiff were not actually occupied by either the La Crosse and Milwaukee Railroad Company, or the Milwaukee and Minnesota Railway Company in 1867 for railway purposes, and others were not occupied or used by the railway company at all.

The decree in the James suit is dated on the 11th day of January, 1867. There is evidence in the record showing that a large number of the lots and blocks involved in this suit were not used by the railway company, and were not necessary to its use at the date of this decree. I contend that such lots and blocks would not be covered by a description using simply the words "*railroad and its appurtenances.*"

The plaintiff specifically pointed out by the evidence a number of such lots and blocks, and asked the court to instruct the jury that they would not be covered by the language of the decree, and the sale. These instructions were all refused.

Before going into detail of these instructions I will call attention to the rules which I think should govern the construction of this decree.

1st. It is the language used by the court in the equity suit of James to express what shall be sold. It may be safe to affirm that it is the language of James' counsel. At all events Howard had no voice in the matter. It is not his language. It is not language which he assented to or advised. "*Doubtful words and provisions are to be taken most strongly against the grantor.*"

Hogg's Appeal, 22d Pa. St., 479.
Coheco vs. Whittier, 10th N. Hamp., 305.
Watson vs. Boylston, 5th Mass., 411.

The reason for this rule seems to be that the language being selected by the party, the fault is his own if he has not clearly expressed the terms of the grant.

2d. The rule that land is not appurtenant to other land so as to pass by the term "appurtenances," is applicable.

In *Woodhull vs. Rosenthal*, 61st N. Y., 390, it is said that the meaning of the term "appurtenances," is now well ascertained by adjudged cases. A thing 'appurtenant' is defined to be used with, and related to, or dependant upon, another thing *more worthy* and agreeing, in its nature and quality, with the thing whereunto it is appendent or appurtenant. It results from this definition that land can never be appurtenant to other land or pass with it as belonging to it." Several cases are cited to the point. It is also said, page 390, that "*even an easement will not pass unless it is* NECESSARY *to the enjoyment of the thing granted.*"

The case of *Harris et al vs. Elliott*, 10th Peters, 54, clearly establishes this principle. In this case there was a conveyance of land by lots and blocks by precise and definite boundaries. The plaintiff brought an action of trespass. The land in suit was a highway, not however included in the description of the land in the deed. It was claimed by the defendant that this highway passed as an "appurtenant" to the land. The court held that the highway was not included in the grant, and approved the rule that "*land cannot be appurtenant to land.*" See pages 53 and 54 of the opinion for the dicussion of this point.

In *Jones vs. Johnston*, 18th Howard, 150, the question was presented whether certain "alluvion or new found land" along the lake shore, in front of certain lots in Chicago, passed as "appurtenant" to the lots in front of which the land had formed. The lots were specifically described. It was held they did not. Justice NELSON, on page 155, says, "Now one answer to this assumption is that a grantee can acquire by his deed, only the lands described in it by metes and bounds, and with sufficient certainty to enable a person of reasonable skill to locate it, and cannot acquire lands outside of the description by way of appurtenance or accession. Lord Coke says, 'a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal,' Coke Litt., 121, B. And this court in Harris et al vs. Elliott, 10th Peters, 54, after approving of the maxim of Coke, observed that, according to this rule, *land cannot be appurtenant to land.*"

In *Ogden vs. Jennings*, 62d N. Y., 526, a deed was executed conveying land by the following description: "All that certain piece or parcel of land situate and being on lot 597, in the town of Virgil, and on the ground now occupied by the present school district, for the sole and express purpose of a school house." The plaintiff brought an action of trespass. The question was whether a certain piece of land, which the children at school were accustomed to use as a play ground, passed by this description. The defendant claimed that it did; the plaintiff that it did not. The plaintiff was sustained on this point, although judgment went against him, and on appeal the judgment was affirmed. The opinion affirming the judgment, discusses the point I am discussing. On page 531 it is said: "It is well settled that in a deed the word appurtenances will not pass any corporeal real property, title to lands, but merely incorporeal easements, or rights and privileges. *It cannot include a strip of land adjacent to that granted. A title to land will not pass by implication.*" The court say on page 532, "there was no evidence that any necessity existed for the possession, by the district, of this or any other parcel of ground, as a play ground. This would *lead to a reversal of the judgment*, unless on examination of the grant, in connection with the evidence, and the plaintiff's title, it is evident that the action cannot be maintained." It does not appear, from the opinion, on what ground the judgment was affirmed. It is clear that the plaintiff would have succeeded had the only question been whether the play ground passed as an "appurtenant" to the land described in the deed.

Now with these rules let us examine the description in the James

decree, and the report of sale and deed under which defendant claims title.

1st. The "*railroad formerly known as the La Crosse and Milwaukee Railroad*," &c.

The La Crosse and Milwaukee Railway Company at one time owned in fee simple, all of the lots and blocks in suit, now claimed by the plaintiff. The fee of these lots and blocks was in that company at the date of the Howard judgment, folio 22, page 11, of printed case.

Does the language of this decree convey all lots and blocks, the fee of which was in the Railway company? or is this grant to be limited to the road-bed and such adjacent property as is necessary to the use of the railroad?

I contend that this language only conveys what would be known and understood as the railroad and its appurtenances. The Railway Company may have a legal title to many lots and blocks of real estate which it does not use, and which is not necessary to the use of its road, and which would pass by a deed or decree specifically describing said lots and blocks. But supposing, while owning such lots and blocks, it makes a conveyance in which the language of the grant is simply "THE RAILROAD" of the company, what land will be included in that description? I affirm that by such language only such property as was actually used for railway purposes, or actually necessary for such use, would pass by such a description. Land not in actual use, or necessary for railway purposes, would not pass by such a description.

In *Morgan & Raynor, trustees, vs. Donovan*, 68th Alabama, 241, the precise question is discussed and decided.

The action was ejectment, "*to recover certain wharf lots in the city of Mobile.*" The charter of the railway company not only authorized the railway company to acquire lands for its use but any steamboat, *wharves*, piers, etc., necessary for their business.

The railway company mortgaged its property by the following language: *the railroad* of the party of the first part, including right of way and all other rights now or hereafter acquired, etc. The "wharf lots" in suit were not specifically mentioned in the mortgage. The plaintiff's title was a sale of these wharf lots on execution issued on a judgment against the railway company and sheriff's deed. The defendant claimed title under a sale on the mortgage. The plaintiff obtained judgment in the ejectment suit, and which judgment was affirmed by the Supreme Court of Alabama. The opinion is an able and exhaustive review of the authorities. It is unnecessary to cite any other authority on this point than the cases cited in the opinion, and *Benedict vs. Heineberg*, 43d Vt., 237.

"It results from what we have said above," says the opinion, in 68th Alabama, on page 263, "that the mortgage conveyed only such property, real and personal, as was useful and necessary, and employed in the construction, maintenance, operation, preservation, repair or security of the road, *and that property owned or acquired, and not used, or to be used, in connection with the railroad, and in promotion of the direct and proximate purposes of its construction was not thereby conveyed*," etc. The case in 43d Vermont, page 231, is equally in point.

Suppose now that the decree of James had been against the La Crosse and Milwaukee Railroad Company, and portions of the real estate, at the date of the decree, was in the condition and used and occupied as testified by the witness Elsner, then we should find these facts:

A portion of lot 5 occupied as a grocery store; (clearly no part of a *railroad.*)

Lots 2, 3 and 4 were not entirely vacant, a *barber shop and shoe shop* were on the lots; (clearly not used for railroad purposes.)

The lot on the corner, on the west of the railroad track, had a wooden building on it *occupied by a jeweler;* (clearly not used for railway purposes.)

Lots and blocks east of the tracks shown on the maps were *occupied by the Northern Transportation Company.* (Not occupied by the Railway Company.)

A portion of lot 3 was used by the city of Milwaukee *for an engine house.*

West of the tracks, lots 3, 6 and 7 *were unoccupied.*

Another piece of the land was used *for a lumber yard!*

It is unnecessary to further detail the evidence. It is enough for the purposes of this point, on this writ of error, that we show that there are lots and blocks of real estate which were not used by the Railway Company at all, or were not used for legitimate railway purposes, and as to all of the lots and blocks in suit not so used, I assert the defendant did not obtain any title thereto under *the language* of the decree in the James suit.

If the decree had described the real estate by lots and blocks, then, the fee of the land being in the La Crosse Company, the description would have been sufficient to convey all such lots and blocks. But such, is not the description.

It is idle to claim that these lots were all conveyed by the word "appurtenances." It cannot be affirmed that because lot 1, block 1, is used for Railway purposes, that lot 2, block 1, used for a jewelry store, simply because it joins lot 1, will pass as "an appurtenant" to lot 1. This would make "land appurtenant to land."

If this point is good then this judgment must be reversed. If there is *one single lot, or part of a lot,* of all the land in suit, the title of which was in Howard, the plaintiff, and which is not included in the sale under the James decree then this *cause must be reversed.*

The laws of Wisconsin permit a plaintiff to recover any portion or part of the land he seeks to recover. He need not recover all he sues for.

The statute of Wisconsin reads as follows: "In any action 'for the recovery of real property, commonly known as actions of 'ejectment,' the plaintiff therein shall be entitled to recover judgment *for any interest,* which it shall be found or determined that the plaintiff has in the land or premises described in the complaint therein, or *for any part or portion thereof* for which it shall be found or determined the plaintiff is entitled to recover; and if there is one or more plaintiffs and a part only of the plaintiffs are entitled to recover, then judgment shall be for the plaintiff or plaintiffs to recover and for such interest in a part of land or premises as aforesaid

for which such plaintiff or plaintiffs are entitled to recover as aforesaid, and the verdict of the jury (or the finding of the court) and judgment shall be accordingly."[Section 44, page 1676, 2d Taylor's Statutes.]

It is evident from the testimony already cited that there are many lots and blocks claimed by the plaintiff which are not included or covered by the description, "*All the railroad*" and its "appurtenances."

2d. The "*depots, station houses and buildings* together with all its rolling stock, franchises appurtenances now *in possession of or claimed by* the defendant the Milwaukee and Minnesota Railway Company."

1. The *Milwaukee and Minnesota Railway* Company had no *claim* on any of these lands by any title *prior to the lien of the Howard judgment.* The only "claim" of title it had was by the mortgage of the La Crosse Railroad Company to Barnes *subsequent in date* to the Howard judgment.

2. All of the lots and blocks I have mentioned in this brief and others named in the evidence, *were not, at the date of this decree, in "the possession of the Milwaukee and Minnesota Railway Company."*

It will be observed that the language of the decree is peculiar: "now *in the possession of or claimed by the Milwaukee and Minnesota Railway Company.*" These are words of description.

Upon the undisputed evidence it was a question of law whether all of the lots and blocks claimed by plaintiff were, at the date of that decree, in the possession of the Milwaukee and Minnesota Railway Company.

Now take our *third* and *fourth* instructions, [folio 393.] These instructions ask the court to say that under the grant or description of lands in the decree in the James suit the defendent was entitled "to none of the real estate in question under that decree except the main line of the railroad. and the buildings actually used as depots and station buildings," etc. This instruction was refused and exception noted. If our argument is sound this is error that should reverse the judgment.

The 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, and 17th instructions are also on this point, calling attention, in some of them,to *specific lots and blocks which plaintiff gave evidence to show were not actually used for railway purposes but for purposes entirely foreign to the legitimate business of a railway company.* Now all such property, I respectfully submit, was not decreed to be sold by the decree in the James suit, *and was not sold.* The Marshal's report of sale gives the description of the property sold in the same language as the decree.

V.

It was argued in the court below that the plaintiff acquired no title to the lots and blocks of real estate sold on the Howard judgment for the reason that a railroad cannot be sold on execution, and that the

sale was simply void, a mere nullity—and must be so treated, everywhere, by all courts and in any proceeding. It seems to me the question is not fairly before this court for discussion.

I contend that the sale of the lots and blocks of real estate in suit was valid and effectual to pass to Howard the interest of the La Crosse and Milwaukee Railroad as of the date of the docketing of that judgment unless such sale has been annulled vacated or set aside by a proper proceeding of a proper party. In other words the sale in any event, is only *voidable* and not *void*.

If the question is examined on principle it would seem as if the point was almost too plain for argument.

The argument to sustain the proposition that a railroad cannot be sold in fragmentary portions, and that such a sale is void is, that such a sale would split the road into divers fragmentary parts, destroy its usefulness as a railroad, be of little or no benefit to the purchaser, and is therefore contrary to good sound public policy.

Now if this is the argument then it would seem as if a small portion of land owned by a railway company, but *mortgaged by the company*, could not be sold under a decree of foreclosure, for, on the score of *public policy*, what difference could or would it make whether a fragmentery portion of a railroad was sold under a foreclosure decree or under a judgment? The separation would be as distinct and emphatic in the one case as the other. The particular tracts of land would be as effectually separated and disjointed from the railway in case of a sale under a foreclosure decree as in case of a sale under a judgment.

Now the record in this case shows that the line of railway and property of the La Crosse and Milwaukee Railroad Company from the city of Milwaukee to Portage city *was mortgaged in sections*. The record in this very case shows that a mortgage of $200,000.00 was executed, on the 13th day of July, 1854, on the *forty miles of the road*, commencing at "the point where it leaves the line heretofore adopted by the Milwaukee and Fond du Lac Railway, in the county of Washington, thence westerly to the town of Beaver Dam." This mortgage covers forty miles of the railway from a point outside of Milwaukee County, and little more than half way to Portage City! It mortgages the middle forty miles of the railroad!

Is that mortgage void? Would a sale of the forty miles thus mortgaged, on a decree of foreclosure of the mortgage, be adjudged void, for the reason that it sold a fragmentary portion of the railway? It seems to me that the learned counsel will hardly assert the invalidity of the mortgage, at least *that it is invalid because against public policy*. The forty miles thus mortgaged would have no terminus at Milwaukee or Portage City. [See 11th Wisconsin, 223-4.]

Again. On the first day of September, 1853, this same railway company executed a mortgage to secure the payment of $200,000.00 on *eighteen miles of the road. Is that mortgage also void?* Cannot that property be sold as mortgaged? If a railway company can mortgage its road and property in sections of *eighteen* miles is there any *public policy* that will forbid a sale of the eighteen miles thus mortgaged on decree on a foreclosure of the mortgage?

The fact then appears on the record that this very railroad has been mortgaged in small sections.

Nor is this all on this question of public policy. The Supreme Court of Wisconsin has held that where very small fragmentary portions of real estate belonging to a railway company have been sold on a decree of foreclosure of a mortgage and the company has made no effort at the proper time and in the proper manner to stop the sale *the sale is valid and will pass the title to the purchaser*, and the only remedy of the company is to proceed under its charter to re-condemn the land.

Kennedy vs. The Mil. & St. P. R'y. Co., 22d Wis. 582.
Hartshorn vs. The Mil. & St. P. R'y. Co., 23d Wis. 692.

Equally emphatic is the Supreme Court of Wisconsin in the case of a mechanics' lien on buildings constructed for railway purposes. *Hill vs. The La Crosse and Milwaukee Railway Company* 11*th Wis.* 224. Hill had a mechanics lien on the buildings claimed as depot buildings by the La Crosse and Milwaukee Railway Company. He sold the property on a judgment obtained in a proceeding to enforce a mechanics' lien. It was argued by the Railway Company that "the building was a part of the road itself, inseparable and indivisable from it, and could not be disintegrated by the remedies of creditors on execution." "*We hold*" *says the court*, "*that the appellants were entitled to the lien given by the statute.*"

The lien which Howard had by his judgment, was a *statutory lien*—a lien given by the statute, just as plainly and clearly as the lien of the mechanic. The mechanic and the mortgagee were held entitled to hold the property upon which they had a lien as against the railway company. The opinion in the Hill case is a masterly discussion of the question and the reasoning of all the Wisconsin cases would seem to fully sustain the position that "*public policy*" *in Wisconsin*, so far from being against is in favor of the sale of all and any railroad property on which *the party has a valid lien.* It is public policy in that State to make railway corporations pay honest debts.

In Wisconsin, if nowhere else, it is held to be sound public policy that the property of a railway corporation shall be liable to sale, and may be sold to pay honest liens upon the property.

This court, in the case of *James vs. Railway Company*, 6th Wal. 752, affirmed the validity of a lien of a judgment on real estate owned by a railway company in Wisconsin.

It seems then, that in Wisconsin it is the policy that the property of a railway corporation upon which there is a valid lien shall be sold to pay the lien even if it is claimed to be railroad property. In case of a mortgage of a single lot and block it shall be sold if necessary, to pay the mortgage. In case of a building into which the mechanic has put his labor and skill, although it may "disintegrate" railroad property, it shall be sold.

The State of Wisconsin following this wise public policy allows a judgment to be a lien on the real estate of the debtor within the County in which the judgment is docketed. It is *a statutory lien.* It allows the real estate of a debtor to be sold on execution, and allows a long period of redemption. Now what good reason can be given why

this judgment, which is a lien, equally as valid a lien as the mechanics' lien, cannot be enforced against the company, [even if the effect is to "disintegrate" the railroad] precisely the same as the mortgagee having a specific lien--or the mechanic who has a lien, given him by statute? Is the property "disintegrated," separated, divided, any more in the one case than the other? It cannot be truthfully affirmed that it is.

There are not wanting decisions to the effect that the real estate of a railway corporation can be sold on execution.

Herman on Execution, 552.

State vs. Rives, 5th Iredell, 297.

In this instance, Mr. Howard, a judgment debtor, followed the "public policy" and law of Wisconsin. He had a valid judgment. It was by virtue of the law of Wisconsin a valid lien on all the real estate of his debtor in Milwaukee County. He proceeds to sell, according to law, the real estate of his debtor, *on which he has a valid lien.* He sells the real estate by lots and blocks. He does not sell by name *a railroad.* He does not sell the franchises of a railroad. He sells just what the *statute law of Wisconsin declares he has a valid lien upon—the real estate of this corporation.* The railway company permits the sale. No bond-holder of the railway company, no trustee of a mortgage executed by the company, no mortgagee, no stock-holder, *no party in interest,* stays, or attempts to stay, the sale. The time for redemption expires, and no one appears to redeem. The sale is made, the deed is executed, the deed is placed on record, and ejectment is brought. It is asserted in this ejectment suit, by another creditor of the railway company, who claims to have sold the same real estate on a decree in equity, that the sale on execution is void, because a fragmentary portion of a railroad cannot be sold on execution. Is the sale thus made valid?

1st. *Who* can assert that the sale is void? Can any and everybody?

2d. *When* can the claim be successfully made?

3d. *In what manner made?*

I have not been able to find a case where a railway corporation has stood by, and permitted a sale of its real estate to be made, a deed to be executed, the purchaser to merge his debt in the real estate, an ejectment suit brought by the purchaser, claiming title by virtue of his deed, and the company permitted on the trial of the ejectment suit to defeat the legal title thus acquired, on the ground that the sale was void because the real estate could not be sold on execution! I think this is the first case where the point has been urged on the trial of an ejectment suit, where the railway company legally holds the fee of the land.

I answer the three questions I have propounded above, as follows:

1st. A stranger, without interest in the premises, certainly cannot set aside the sale.

2d. The claim cannot be successfully made in *a collateral proceeding.*

3d. The claim must be made by *a proper party, at or before the sale, by a proper bill, to which all persons in interest should be made parties.*

The leading case relied on in the court below, to show the execution

sale void, was *Gue vs. Tide Water Canal Company*, 24th Howard, 257. Gue obtained a judgment against a corporation, issued an execution thereon, and levied the execution on "*a house and lot, sundry canal locks, a wharf, and sundry other lots which the company owned in fee.*" What did the company do after the levy was made? Did it lay still, let the sale go on, let the creditor wipe out his debt by the sale, take a deed of the property in lieu of the debt, and then, on a *trial of an ejectment suit, claim the sale void?* No, it immediately filed a bill *to stop the sale, making Gue a party.* The court said there was AN EQUITY in the bill. The corporation promptly asserted the equity. It did not *waive* the equity by acquiescing in or permitting the sale.

Now can not the railway company and all of its stock-holders, bond-bolders, mortgagees, and all parties in interest WAIVE this mere equity? A party may even waive a constitutional right, *Baird vs. Mayor*, 74th N. Y., 386. Certainly it would be against all of the analogies of the law to allow all parties in interest to stand silently by and see the real estate of a corporation sold, and the property taken for the debt, and then in an action of ejectment by a third party, a collateral proceeding, to set up for the first time what is conceded to be *a mere equity to defeat such a legal title.*

The sale is not void. It is at best only voidable. Concede that it might have been avoided by a proper proceeding, taken at a proper time, by the corporation, the trustees named in the mortgage, the bond-holders, creditors, stockholders, or any party in interest—say that, perhaps, the court, in an equity suit of some of the parties, might and would have enjoined the sale, will it do the same thing when it appears no such parties asked for any such relief, but silently permitted a sale? Will they now be permitted to allege *an equity* to defeat the legal title?

In the Federal Courts the party holding the *strict legal title* must prevail.

In *Foster vs. Moran*, 8th Otto, page 428, Justice MILLER says: "In actions of ejectment, in the United States Courts, the strict legal title prevails. If there are *equities* which would show the right to be in another these can only be considered *on the equity* side of the Federal Courts."

I insist, then, that the sale on execution is not void as between the parties to this suit. It is at the most *voidable*, and voidable only by the corporation in a proper proceeding. It can be only avoided by a proper proceeding taken at the proper time by a proper party. It can not be annulled, vacated or set aside *in an ejectment suit between third parties.*

In *Herman on Execution*, page 350, is this language: "*A stranger has no right to object to the sale. The debtor* is the only one who can complain, as he is the only one who would or could be benefitted by a sale in parcels, *and he may wave the right to so sell if he desires.*"

There are numerous cases which decide that in States, where a sale of land to an alien is void, the deed conveying the title will not be held invalid *in an ejectment suit between third parties.*

In *Cross vs. DeValle*, 1st Wal., 1, this point was decided. Justice GRIER, on page 13, says: "That an alien may take by deed or devise

and hold against any one but the sovereign, until office found, is a familiar principle of law which it requires no citation of authorities to establish."

In *Lee vs. Watson*, 1st Wal., 337, Justice Davis says: "It is contended that the legislature of Missouri had *no power* to grant the privilege of pre-emption. If this was a contest between the United States and the State of Missouri the question of power would be a proper subject for examination. But the *United States are not complaining, and no other party has a right to complain.*"

In *Osterman vs. Baldwin*, 6th Wal., 121, Justice DAVIS says: "It is true, as the defendants insist, that when the purchases were made by Baldwin, Texas was a foreign country, with a constitution forbidding aliens to hold real estate. *But the defendant cannot object on that ground.* Until office found, Baldwin was competent to hold land against third persons. No one has any right to complain in a collateral proceeding if the sovereign does not enforce his prerogative."

In *National Bank vs. Matthews*, 8th Otto, 628, Justice SWAYNE says: "When a corporation is incompetent by its charter, to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

In *Low vs. Lewis*, 46th Cal., 552, the court say: "In making the deed to the plaintiff the city and county was therefore dealing with its own property. The defendant had no interest in the question whether the plaintiff was the assignee of Buchanan, and as such entitled to the conveyance. *The parties in interest being satisfied on this point, a stranger to the transaction and to the title, having no privity with either party, will not be allowed to question the existence of a fact on which the parties in interest have acted in the exercise of a power conferred by statute.* It was therefore not incumbent on the plaintiff to prove the assignment from Buchanan, otherwise than by the recitals of the deed."

In *Crane vs. Reeder*, 25th Mich., 305, in an action of ejectment, it was sought *collaterally* to show a deed void on account of the alienage of the grantee, and fraud in obtaining the patent. COOLEY, J., says, on page 312, "But the state raises no question of fraud, nor does it, so far as we are advised, dispute on any ground, the validity of the plaintiff's deed. And the question of fraud is raised by parties who have no interest in it whatever. For it does not concern these defendants whether the state asserts in its own name, a right to these lands as escheated, or conveys its claims to another, who sues upon it, their defense is the same in either case, and the rule is general that the adverse claimant is not permitted to raise a question of fraud in the conveyance to which he is a stranger. *This is elementary law*, and I should not deem it necessary to spend a moments' time upon it if several cases had not been cited as justifying the ruling below, which admitted the evidence."

Further citations are unnecessary. The defendant is in no position, in this suit, to make the point that the lots and blocks of real estate sold by Howard, were not subject to sale on his judgment because a railroad cannot be sold on execution. The railway company is not complaining of the sale. It finds no fault with the sale. It does not

object to the sale. No party has sought, *by any direct proceeding, to annul the sale.* So long as the sale remains unimpeached the legal title must prevail, The question of the "equity" of the sale cannot be tried in this ejectment suit.

VI.

It was said the remedy of Howard was a bill to redeem from the sale on the James decree!

I think this point not well taken. If Howard's deed is valid his only remedy to recover the land is ejectment. He has no remedy in equity to redeem. He has the *legal title* and is out of possession.

At the time he purchased the lots and blocks of real estate in suit, he was entitled, as against the La Crosse Railway Company and all mere incumbrancers, to the possession of the lands. The Cleveland judgment was then a mere lien on these lands. Nothing but a lien. Cleveland had no *title to the lands by reason of his judgment.*

The sale of Howard (the time for redemption from the sale having expired), had forever cut off the Barnes mortgage and all claiming under it, *to all of the real estate sold by Howard.* The Milwaukee and Minnesota Company, as against Howard, had no longer any right, title or interest in any of the land thus sold. Nor had any person claiming under it, subsequent to that judgment. Now if Howard had taken possession of all the real estate he sold immediately on the sale, what could Cleveland have done to eject him? Nothing. Why? Because Cleveland had, at that time, a *mere lien* by his judgment. Howard could, at that time, have paid that judgment. He could not then file a bill to redeem, as he had only to pay the judgment. Howard then, if in possession, could not have been ejected by Cleveland, simply because *he held the legal title, and Cleveland did not.*

Now how is it claimed that as against Howard, the Cleveland judgment has ripened into a legal title? By a sale on execution, and time of redemption expired? No! It is claimed that Cleveland assigned this judgment, that the assignee commenced a suit in equity against the La Crosse and Minnesota Company only, and in that equity suit sold the lands owned by Howard, and thereby *cut off Howard's title;* or if not that, that it so far divested title that Howard must redeem!

Now let us examine this proposition in detail. The Cleveland judgment was undoubtedly a prior lien. Had execution been issued and the lands sold, the time of redemption expired, and deed issued, without doubt the purchaser would have acquired as against Howard, Barnes and the Minnesota Railway Company, the legal title to the lands. But this was not done. An equity suit was commenced against the Milwaukee and Minnesota Railway Company only, to sell the interest of that company in the real estate? What interest as against Howard had that company, at that time, *to the land in suit? Not any.* Howard had previously sold all of that interest, and obtained a deed. How then could Howard, at the date of the James suit, holding the legal title, and having the right to pay off the Cleveland judgment,

bring *a bill to redeem?* The answer to that bill would be that he had a complete remedy *at law by ejectment.* He could eject the Minnesota Company from all the lands he purchased. This would dismiss his bill.

In *Hipp et al. vs. Babin et al.*, 19th Howard, 277, this court say: "The bill in this cause is, in substance and legal effect, an ejectment bill. The title appears, by the bill, to be merely legal; the evidence to support it appears from documents accessible to either party, and no particular circumstances are stated showing the necessity of the court interfering either for preventing suits or other vexation, or for preventing an injustice irremediable at law."

This is also the settled law of Wisconsin.

In *Gray vs. Taylor*, 40th Wis., 579, it is held that one who has a remedy at law to determine his title to land, cannot maintain an equitable action to quiet the title.

The Court say: "*Clearly, the plaintiff, if he owns the lot, can maintain ejectment against Thompson to recover it.*"

The judgment of the lower courts was affirmed on the sole ground that the plaintiff had an adequate remedy at law.

The effect then of the James decree and sale, as Howard was no party to the suit, is to leave Howard where he was before *that suit was commenced.* His rights have not been changed, altered, or in any respect impaired or affected by that suit. He is entitled to the posession of the real estate subject to the Cleveland judgment, and other prior incumbrances, the same as if James had never commenced his equity suit. He could have maintained ejectment against any and all persons claiming title from the La Crosse Railway Company, subsequent to the date of the docketing of his judgment. And he then had the right to pay off all prior incumbrances. He is in that same position to-day, unless his rights can be impaired or affected by a proceeding *to which he was not a party.* The Cleveland judgment as to him, *is a mere lien.* He can hold the property subject to that lien until he is cut off by some proceeding to which he is a party.

VII.

The records of the suit of the Milwaukee and St. Paul Railway Company against the La Crosse and Milwaukee Railroad Company, and of James against the same company, commenced in Circuit Court of Milwaukee County, are admissible in evidence to show the fraud in the execution of the mortgage to Barnes, and the proceedings to foreclose the said mortgage.

These are sworn statements made in judicial proceedings. They afford the highest and best evidence of the knowledge of the parties of the fraud.

VIII.

It is asserted by defendant that James was obliged, under the decision of *Gue vs. Tide Water Canal Co.*, to go into chancery, to sell the railroad property. Admit it, for the sake of this argument, and what follows? Simply and only this, that if he would cut off the legal title on such sale to that portion of the real estate owned by Howard, he must *make Howard a party to the suit.*

That Howard was a *necessary* party to the suit of James is too clear for argument. Howard had all the title in the land that the La Crosse Railroad Company had at the date of the docketing of his judgment.

The La Crosse Railway Company had, by not opposing or staying the sale, consented to it. *His deed was and had been for nearly two years on record.* James knew that Howard had sold the lands of the company in Milwaukee County, on his execution, for he so alleges in his complaint, filed in the Circuit Court of Milwaukee County, long prior to his filing his bill in the Federal Court.

Who then were the *necessary* parties defendants to this equity suit of James, to enforce the lien of the Cleveland judgment? I answer all parties who had any interest in that property by lien, incumbrance, sale, mortgage, purchase or in any form subsequent to the date of the Cleveland judgment.

At the time James commenced his suit Howard had a clear right to pay the Cleveland judgment because he then *had the legal title.* Now how can that legal title be taken from Howard and given to James? If James cannot proceed by sale on execution and so cut off that title, he must come into a court of equity, and if he proceeds to obtain a sale by decree in equity, Howard, being the owner of the fee as to all the lands he sold on execution, is a *necessary party* to that suit.

Shields vs. Barrow, 17th How., 130.
Russell vs. Charles, Ex., 7th Cranch, 69.

In the first case above cited, the bill was dismissed after thirteen years litigation, because necessary parties were not before the court.

It seems unnecessary to further argue the point.

It is plain, I think, that the judgment of the court below is erroneous in holding that the defendant has a better title to the lands in suit than the plaintiff.

Their title is the sale on the decree in the James suit. That decree was made in a suit to which Howard was not a party. He cannot be affected by it. As against him it is a mere nullity, of no force or effect whatever, either as evidence or adjudication of title. And the decree, assuming it valid, does not in terms sell or profess to sell, all the lots and blocks claimed by plaintiff. It is evident, from the record, that there are many lots and blocks not covered by the description in the decree in the James suit.

H. M. FINCH,
Of Counsel for Plaintiff in Error.

ILSLEY & MARX, PRINTERS, 94 FULTON ST., N. Y.

OFFICE SUPREME COURT U. S.
FILED
APR 23 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1879.—No. 288.

CHARLES HOWARD,

Plaintiff in Error.

vs.

THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *et. al.*

This is an action of ejectment brought by the plaintiff in error against The Milwaukee & St. Paul Railway Company to recover certain lots and blocks on which the defendant's railway is constructed from Humbolt Avenue in the City of Milwaukee to its terminus at the south side of block 41, the distance of one mile or more, together with certain lots occupied as depot grounds. This road was constructed in 1853-4. Was the eastern end of the La Crosse & Milwaukee Railroad, and its passenger depot in Mil-

waukee is situated on said block 41 and all its freight depots and warehouses and side tracks in Milwaukee are situated between said block 41 and said Humbolt Avenue on the premises in question. The grounds were acquired by the Company from 1853 to 1856, and have been in use ever since, as the road bed, right of way and depot grounds of said railroad. The plaintiff in error, claims title to said premises by virtue of an execution sale, made on the 15th day of January, 1859, on a judgment docketed May 1st, 1858, recovered by Sebre Howard against the La Crosse & ~~Michigan~~ Milwaukee Railway Company in the Circuit Court of Milwaukee County.

Record pp. 7 to 11.

The defendant claims title to the property by virtue of a sale, made on the 2d day of March, 1867, on a judgment rendered in favor of Newcomb Cleveland against the La Cross & Milwaukee Railroad Company, recovered in the District Court of the United States for the District of Wisconsin, October 7th, 1857, which was by several mesne assignments, (Record pp. 19 to 21.) transferred to Frederick P. James, and the sale was made in pursuance of a decree entered on the 11th day of January, 1867, of the Circuit Court of the U. S. for the Eastern District of Wisconsin in the nature of an execution of said judgment, and the property purchased by the defendant. The decree was made in the suit of James against the Milwaukee and Minnesota Railroad Company. In pursuance of this sale the property was surrendered to the defendant.

The plaintiff was never in possession of the prop-

erty, and is and was a non-resident of Wisconsin at the time of commencing said suit by said James.

Record pp. 19 to 37.

It appeared on the trial that on the 21st day of June, 1858, the La Crosse & Milwaukee Railroad Company executed a mortgage to William Barnes as trustee to secure $2,000,000, and on the 11th day of August, executed a supplemental mortgage. That said mortgage was foreclosed in 1859, by advertisement and the premises sold, and that the purchasers formed, under the statutes of Wisconsin, the Milwaukee & Minnesota Railroad Company, as successor of the La Crosse & Milwaukee Railroad Company.

Record pp. 11 to 16.

It further appeared that the whole of the La Crosse & Milwaukee Railroad was leased to Selah Chamberlain September 26th, 1857, which lease provided that he should pay the interest on certain bonds and apply the residue of the earnings to the payment of the indebtedness due him.

Record p. 18.

After the forclosure of the Barnes mortgage, the La Crosse & Milwaukee Railroad Company practically ceased to exist as a corporation or keep up an organization.

Record pp. 37 and 38, p. 145.

It further appeared that on the 11th day of June, 1860, Hans Crocker in pursuance of the orders of the Court below, took possession as Receiver of The La

Crosse & Milwaukee Railroad, with all of said Company's offices, books and papers, including all the lots and property in question. This appointment was made as to the western half of the road, in the forclosure suit of Bronson, Soutter & Knapp, as to the eastern part, in the suit of Sebre Howard which was a creditor's bill on a judgment, obtained in the District Court of the United States for the District of Wisconsin, recovered on the aforesaid judgment so as aforesaid recovered by him in the Circuit Court of Milwaukee County; subsequently he was also appointed receiver in the suit of Bronson & Soutter to foreclose mortgage on eastern end of the road.

Record pp. 61 to 65.

Record p. 126.

In the suit of Bronson & Soutter commenced December 9th, 1859, Sebre and Charles Howard were defendants and Charles Howard appeared as a defendant in the litigation. On the 18th day of July, 1875, an order was entered in that suit as follows:

See Record pp. 38 and 39.

And on the same day came the Milwaukee & Minnesota Railroad Company by Matt. H. Carpenter, its solicitor, and on his motion and on the mandate of the Supreme Court of the United States in this cause, ordered that the whole amount due the complainants in this cause, and to become due before the day of sale of the mortgaged premises, are estimated, as now appears to be, as follows, viz: amount fixed by order or decree nisi, $405,290.05, together with interest thereon since September 27, 1864; coupons due

March 1, 1865, $40,000, with interest thereon since that date; coupon to become due September 1st, 1865, $40,000, with interest, $35,769.33 with interest thereon from this day.

Ordered further, that in case said Milwaukee & Minnesota Railroad Company shall before the sale of the mortgaged premises in this cause pay to the clerk of this Court for the complainant in this cause the several sums above mentioned, with interest thereon as aforesaid, to the day of such payment, and the costs in this cause to be taxed, that upon such payment the said receiver, Hans Crocker, and the said Milwaukee & St. Paul Railroad Company, its officers, directors, agents and employees, deliver over to said Milwaukee & Minnesota Railroad Company the eastern division so-called, of the La Crosse & Milwaukee Railroad, so-called, from Milwaukee to Portage, together with all the rolling stock that was on the whole of the La Crosse & Milwaukee Railroad, or belonged or appertained thereto, when the said receiver was appointed, except forty box cars, numbered as follows, (here follow the numbers of forty cars;) and also deliver to said Milwaukee & Minnesota Railroad Company such proportion of the rolling stock that was purchased by the receiver as 131,178 dollars bears to 46,199 dollars, together with all the rights, privileges and franchises, and personal and other property, belonging or in anywise appertaining to said roalroad from Milwaukee to Portage, and that said receiver be thereafter dismissed and discharged, except for the purpose of passing his accounts.

It also appeared that the Milwaukee & Minnesota Railroad Company paid said money as directed by said order on the 4th day of January, 1866, and that afterwards and on the 20th day of January, 1866 said road and property were by the said receiver delivered to said Milwaukee & Minnesota Railroad Company.

That afterwards on the 18th day of April, 1866, the said Frederick P. James filed his aforesaid bill in the Circuit Court of the United for the Eastern District of Wisconsin, against the said Milwaukee & Minnesota Railroad Company, to enforce the said judgment so recovered, by Newcomb Cleveland, by a sale of the said railroad and premises, so as aforesaid, delivered to the said railroad company; and that a decree of sale was entered January 11th, 1867, and a sale in pursuance thereof had on the 2d day of March, 1867, and purchase by defendant, which sale was duly confirmed, and possession of the premises in question, surrendered to the purchaser in pursuance thereof on the 6th day of March, 1867.

Record pp. 21 to 37.

The said execution decree provided that the sale should be made subject to certain prior liens and for the purpose of showing that said liens existed as therein stated, evidence thereof was introduced.

Record pp. 16 to 17.

It was also proved that all the lots in question were necessarily used as a part of said railroad and that they were actually covered by its tracks and depots and in actual use and that no part thereof could be disposed of or seperated from said road without in-

jury to its successful and proper operation. These facts were established by the testimony of Wm. R. Sill, chief engineer of the road up to 1866.

Record pp. 40 to 46.

By Don. J. Whittemore, present chief engineer and who has been engaged on the road since commencement in 1854.

Record pp. 46 to 53.

By Edwin H. Goodrich who was superintendent and manager from 1859 to 1865.

Record p. 145.

By John C. Gault, assistant general manager of defendant.

Record p. 53.

And by H. C. Atkins and Lewis B. Rock, superintendents now in charge.

Record pp. 54 and 55.

It was further proved that all the property in question passed into the hands and possession of Hans Crocker as receiver June 11th, 1860, and remained in his hands and possession until January 20th, 1866, when it was delivered by him to the Milwaukee & Minnesota Railroad Company, and that it remained in their possession until March 6th, 1867, and until the aforesaid sale and confirmation thereof on the Cleveland judgment by virtue of the James decree when it was surrendered to the defendant.

Record pp. 46 to 65.

The testimony in rebuttal (record pp. 69 to 126) is wholly irrelevant and immaterial and should have been excluded by the Court below. It has no bearing upon any question involved in this suit.

I.

The sale on execution of the lots, over and upon which the La Crosse & Milwaukee Railroad had been constructed and operated for over six years and which had been acquired and used and were then being used by it as its right of way, roadbed and depot grounds in the operation of said railroad, was not authorized by law and was invalid to pass the title of said lots to the purchaser either as a sale of the lots or of that portion of the railroad.

There was no statute in Wisconsin authorizing such sale and none authorizing a sale of a railroad or any portion thereof on an execution issued on a judgment. There was no statute authorizing the sale of a franchise of a railroad except by the foreclosure of a mortgage which conveyed such franchise.

It is true that a railroad is in fact real estate and that a judgment against the company owing it creates a lien upon it. Yet it is not all real estate. It is a complicated machine consisting in part of real estate and partly of personal property, combined with certain franchises and privileges granted by the legislature. They cannot be seperated without destroying its usefulness and value. It cannot therefore be treated as wholly real estate and in the enforcement

of liens upon it, reference must be had to its nature and character, and they must be so enforced as not to destroy it, or impair its usefulness to the public.

It is competent for the legislature to provide that a railroad including its real and personal property and its franchises may be sold as an entirety on an execution. The State of Pennsylvania, by an act passed in 1870, did so provide and sales under it have taken place in that State.

P. and Baltimore Central, Appeal 70 Pa. State 355.

Prior to that statute no such sale was authorized and judgments were enforced only by a sequestration of the tolls and income.

A franchise is not the subject of a sale on execution unless authorized by express statute.

Herman on execution, p. 557 and cases cited.

See also cases cited below.

But Courts of Equity, wherever such Courts exist, have exercised the power of subjecting the franchises held by the debtor in connection with property to the payment of debts, by sequestrating the income as in Vermont, or more usually by a sale of the property and franchise together. Such is the law of Wisconsin.

The usual remedy for the enforcement of judgments against railroad companies or other similar corporations where Courts of Equity exist is to appoint a receiver to take the tolls and income, but when such income is not likely to satisfy such judgment within a reasonable period, it is the usual practice to accele-

rate the payment by decreeing a sale of the whole property with all its franchises as an entirety, which Redfield says is a "legitimate mode of granting execution in equity." Such has been the uniform practice of the courts of the United States and of the several states which have no statute regulating such proceedings.

Gue *vs.* Tide Water Canal Co., 24 How. 257.

James *vs.* Railroad Co., 6 Wallace, 748.

Covington Bridge *vs.* Shepherd, 21 How. 112.

Opinion of Judge McLean in Coe, Trustee *vs.* Pennock and others, American Law Register, volume 6, page 27.

See also same case, 23 Howard, 117.

Macon R. R. Co., *vs.* Parker, 9 Georgia 377.

Amant *vs.* The New Alex &c. 13 Sergeant & Rawle 210.

Susquehanna Canal Co. *vs.* Bonham, 9 Watts and Sergt. 27.

Railroad Companies *vs.* Chamberlain, 6 Wallace 748.

Coney *vs.* P. Ft. Wayne & Chicago, 3 Phil. R. 173.

Noble *vs.* The State, 43 Georgia 466.

Law of Sheriffs and Coroners by Gwyne, p. 341.

These cases fully establish the doctrine that a railroad cannot be sold on execution, where there is no statute authorizing it, and that the remedy in equity

when the whole property will be decreed to be sold, which proceeding is in the nature of an equitable execution on the judgment.

The argument of the counsel opposed that there is no more objections to selling a part of a railroad on execution than there is to such sale on the foreclosure of the mortgage is without force for the reason that the statute expressly anthorized such mortgage of a part and a seperate sale of the part so mortgaged.

Wisconsin General Law of 1856.

Neither are the cases in the 22d and 23d Wisconsin cited by the counsel in point on this question. In those cases the Company had constructed its road across those tracks, which were mortgaged at the time without procuring a release from the mortgagee. The Court held that said mortgages could be enforced by a foreclosure, but that the company was entitled to the land taken on paying the value of the land taken at the time, it was taken with interest. In the case in the 11th Wisconsin cited by counsel, the Court hold the mechanics' lien law applied to railroads as well as other property and might be enforced against them.

It is not necessary that the company or any creditor should object to, or enjoin, or attempt to make such sale. Public policy forbids that such a sale should be made and every and any party whose interest is affected thereby may object at any time when it is attempted to enforce such a pretended sale.

This court, in the cases above cited, has decided that an execution sale was not the proper remedy to enforce a judgment against a railroad, but that a bill in equity was the proper remedy; and this decision

necessarily excludes the proceeding by execution; for if there was a remedy at law the proceeding in equity would necessarily be excluded.

2. But in this case there has been no sale ofthe railroad as such. Its existence has been entirely ignored; and a pretended sale has been made of the lots and blocks upon which the railroad, its road-bed, tracks, depots, and warehouses are situated as real estate. There is no authority anywhere for such a proceeding.

Herman on Executions, page 552, says, "the lands "easements or works appurtenant or essential to the "practical use and occupation of the franchise can- "not be sold separate from the franchise so as to im- "pair its value or impede its use."

Plymouth Rk. *vs.* Colwell and Jacoby, 39 Pa. State, 337.

Youngman *vs.* Railroad Company, 65 Pa. State 278.

Coe *vs.* Columbus Piqua R. R. Co., 10 Ohio State, 372, see 402-3.

Gue *vs.* Tidewater Canal Co., 24 Howard 259.

There is no conflict of authority upon this question.

Justice McLean remarks in the opinion above cited that, "the railroad like a complicated machine con- "sists of a great number of parts, a combined action "of which is essential to produce revenue—And as "well might a creditor claim the right to levy on, "and abstract some essential part of Woodworth's "planing machine, or any other combination of ma-

"chinery as to take from a railroad its locomotives "or its passenger cars." It is true this was said of the rolling stock of the road, but it applies with much greater force to the action here attempted.

The creditor here attempts to sell as lots, and blocks the right of way, road-bed and tracks of a railroad, ignoring the fact that it is the city terminus of a railroad of two hundred miles in length, that a railroad has been constructed over it at great expense and at the time of such pretended sale it was covered with the tracks of the railroad and in constant use as such and necessary to the company to exercise its franchises and operate its railroad. I find no authority to support such a proceeding, but all precedent and authority is against it. The plaintiff in error therefore showed no title to the property that could authorize him to recover the premises in question from the defendant.

II.

Admitting, for the argument, that the planitff in error had shown a prima facie title as claimed still the verdict of the jury was right and must stand for the reason that the defendant was in possession of the premises by title paramount or superior to the plaintiff's.

The plaintiff in error claims title by virtue of a sale on a judgment against The La Crosse & Milwaukee Railroad Company, docketed May 1st, 1858. The defendants title arises from a sale on a judgment recovered in the District Court of the United States

for the District of Wisconsin, by Newcomb Cleveland against the said La Crosse & Milwaukee Railroad Company, and docketed so as to become a lien on the 7th day of October, A. D. 1857. This judgment by several *mesne* assignments was transferred to F. P. James. On the 18th day of April, 1866, the Milwaukee & Minnesota Railway Company were in possession of the premises in question, and operating said railroad, claiming as owner thereof, as successor to all the rights, privileges and property of the La Crosse & Milwaukee Railroad Company in virtue of a mortgage given by the last named company to William Barnes, as trustee to secure certain bonds, bearing date June 11th, 1858. The foreclosure thereof and sale, and the formation of Milwaukee & Minnesota Railroad Company by the purchasers at said sale under the statute in such cases made and provided and the transfer by said purchasers of said mortgaged premises to said company. On the said 18th day of April, 1866, the said James so being the owner of said Cleveland judgment, for the purpose of enforcing the lein thereof against the said La Crosse & Milwaukee Railroad filed his bill against said Milwaukee & Minnesota Railroad Company on said judgment praying in the Circuit Court of the United States for the Eastern District of Wisconsin, among other things, that a decree might be rendered therein, fixing the amount due on said judgment, declaring the same a lien on said Eastern Division of said railroad together with all its property, depot-grounds, fixtures and appurtenances, and that said Eastern Division of said railroad might be decreed to be sold with its franchises, property, fixtures and

appurtenances under the order and directions of said Court subject to certain incumbrances and out of the proceeds that said judgment might be satisfied. That said Milwaukee & Minnesota Railroad Company appeared and answered, and such proceedings were thereafter had in said suit that a decree was entered as prayed, and a sale of said premises had which were purchased by the defendants in this suit and which was duly confirmed. Three appeals were taken to this Court by the said Milwaukee & Minnesota Railroad Company. One from said decree. One from the refusal to open and set aside the same, and one from the order confirming said sale. All of which were affirmed by this Court.

6 Wallace 651.

Which is the title of the defendant and which it claims is superior to the title of the plaintiff. The opinion of the District Judge who tried this case at the Circuit is published at length in

7 Bissell, 73.

The counsel for the plaintiff in error does not deny but that our judgment was prior to his, but claims that it should have been enforced by a sale on execution instead of by a proceeding in equity. This Court has already decided this question in this very case by affirming our decree and sale.

2. He claims that he should have been made a party to our bill. To this we reply that had he been within the jurisdiction of the Court he might have been a proper although not a necessary party, and the fact that he was not a party does not affect the

regularity of our proceedings. We enforced our judgment in the mode prescribed by the laws of the land and had he applied within a reasonable time he would doubtedly have been allowed to redeem. Whether that right still remains to him cannot be decided in this suit. His laches for over fourteen years should bar his right.

3. We deny that the plaintiff can in this action raise the questions stated in the third point of this brief. Our title cannot in this action be avoided on the ground that there is some equitable defence to it.

But waiving this objection, there is neither *truth* or force in the objections. There is not a particle of proof that Cleveland's judgment had been paid when the action was brought by James to enforce it, or that it was ever paid except by a sale of said premises. The counsel refers to the amount paid to Chamberlain by the defendant on the purchase of the judgment by the defendant as a payment of the judgment. These matters stated in said third point were set up in the answer of the said Milwaukee & Minnesota Railroad Company to the bill of James to enforce said Cleveland judgment and were then adjudicated.

See answer of said company, record pp. 24, 26 and 27.

4. The counsel has introduced the record of several suits, prosecuted in the State Courts of Wisconsin and the Federal Courts of that district, by the defendant and by James which have no bearing or relevancy to the question here at issue. They were suits insti-

tuted and prosecuted on a theory which this Court overruled and which was afterwards abandoned and they require no further notice. The judgment should be affirmed for the reasons stated by the District Judge in his opinion, and also because the plaintiff failed to show any legal title to the premises.

JOHN W. CARY,
of Counsel for
Defendant.

53 Cal. 228

43 Vt.

11 How. 459

44 Pa-St. 294

21. Wallace. 293. 40